Supreme Court, U.S.
FILED

No. 95- 95-488 SEP 19 1995

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

ALASKA AIRLINES, INC., AMERICAN AIRLINES, INC., DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., and UNITED AIR LINES, INC.,
Petitioners,

v.

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, HENRY J. VOSS, as Director of the California Department of Food and Agriculture, and STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
DONALD B. AYER
JONES, DAY, REAVIS & POGUE
Metropolitan Square
1450 G. Street, N.W.
Washington, D.C. 20005
(202) 879-3939

BURT PINES
(Counsel of Record)
JOHN A. SCHWIMMER
ALSCHULER, GROSSMAN & PINES
2049 Century Park East
39th Floor
Los Angeles, CA 90067-3213
(310) 277-1226
Counsel for Petitioners

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

QUESTION PRESENTED

Whether a fee imposed by the State of California on arriving international flights, which fee is for agricultural inspections and not for the use of airport facilities, is exempt from the federal prohibition on fees or charges on "the transportation of an individual traveling in air commerce" or on "the sale of air transportation" set out in the Anti-Head Tax Act, 49 U.S.C. § 40116(b) (former 49 U.S.C. App. § 1513(a)), merely because the fee applies to both passenger and non-passenger flights.

PARTIES TO THE PROCEEDINGS

Petitioners Alaska Airlines, Inc., American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., and United Air Lines, Inc. were plaintiffs in the Los Angeles Superior Court, respondents in the Court of Appeal of the State of California, Second Appellate District, and petitioners to the California Supreme Court. The California Department of Food and Agriculture, Henry J. Voss, as Director of the California Department of Food and Agriculture, and the State of California were defendants in the Los Angeles Superior Court and appellants in the Court of Appeal.

Petitioner Alaska Airlines, Inc. states that its parent company is Alaska Air Group, Inc., and that it has no non-wholly owned subsidiaries.

Petitioner American Airlines, Inc. states that its parent company is AMR Corporation, and that it has no non-wholly owned subsidiaries.

Petitioner Delta Air Lines, Inc. states that it has no parent company and no non-wholly owned subsidiaries.

Petitioner Northwest Airlines, Inc. states that its parent companies are NWA, Inc., and Northwest Airlines Corporation, and that it has no non-wholly owned subsidiaries.

Petitioner United Air Lines, Inc. states that its parent company is UAL Corporation, and that its only non-wholly owned subsidiaries are Kion de Mexico, S.A. de C.V., and Four Star Insurance Company, Ltd.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
STATEMENT	6
REASONS FOR GRANTING THE PETITION	9
I.	
THE DECISION BELOW LIMITING THE COVERAGE OF SECTION 1513(a) TO FEES RELATING ONLY TO THE TRANSPORTATION OF PERSONS IS CONTRARY TO THIS COURT'S DECISIONS IN *ALOHA AIRLINES* AND *NORTHWEST AIRLINES*	9
II.	
THE INSPECTION FEE DOES NOT FALL WITHIN THE "SAVING" CLAUSE OF SECTION 1513(b)	14
III.	
THE DECISION BELOW, IF ALLOWED TO STAND, WILL BE HIGHLY DISRUPTIVE TO INTERSTATE AND INTERNATIONAL AIR COMMERCE	16
CONCLUSION	18
APPENDICES	
Appendix A:	
Decision of the California Court of Appeal, Second Appellate District, filed March 27, 1995	A-2

TABLE OF CONTENTS

Page

Appendix B:

Order of the California Supreme Court Denying Petition for Review, filed June 22, 1995 ..... A-16

Appendix C:

Federal Anti-Head Tax Act (present version) 49 U.S.C. § 40116 ..... A-17

Appendix D:

California Airport and Maritime Plant Quarantine, Inspection and Plant Protection Act, adopted September 30, 1990 ..... A-21

Appendix E:

California Department of Food and Agriculture Regulation, adopted April 1, 1991 ..... A-28

Appendix F:

First Amended Complaint for Declaratory Relief, Injunctive Relief, and Restitution, filed June 17, 1992 ..... A-30

Appendix G:

Order Granting Motion for Summary Adjudication of Issues and for Summary Judgment, filed July 9, 1993 ..... A-42

Appendix H:

Judgment by Court, filed July 9, 1993 ..... A-55

TABLE OF AUTHORITIES

Cases

Page

Federal

Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7, 104 S.Ct. 291, 78 L.Ed.2d 10 (1983) 9, 10, 12, 16

Denver v. Continental Airlines, Inc., 712 F.Supp. 834 (D.Colo. 1989) 11, 12, 14, 15

Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972) 9

Indianapolis Airport Authority v. American Airlines, Inc., 733 F.2d 1262 (7th Cir. 1984) 11

Northwest Airlines, Inc. v. County of Kent, 510 U.S. ____, 114 S.Ct. 855, 127 L.Ed.2d 183 (1994) 8, 10, 11, 12, 13, 16

Rocky Mountain Airways, Inc. v. County of Pitkin, 674 F.Supp. 312 (D.Colo. 1987) 11, 12

State

Airborne Freight Corp. v. New York State Department of Taxation and Finance, 137 A.D.2d 30, 527 N.Y.S.2d 107 (1988) 12

Republic Airlines, Inc. v. Department of Treasury, 169 Mich.App. 674, 427 N.W.2d 182 (1988) 12

Constitutional Provision

United States Constitution, Art. 1, § 8, cl. 3 2

TABLE OF AUTHORITIES

Statutes

Page

Federal

28 U.S.C. § 1257(a) 2

49 U.S.C. App. § 1513 ..... *passim*

49 U.S.C. App. §§ 1301(10) and (24) 10, 13

49 U.S.C. § 40102 ..... 10, 13

49 U.S.C. § 40116 ..... 3, 8

State

California Food and Agricultural Code §§ 5350-5353 ..... 4, 6, 12

Title 3, California Code of Regulations § 3560 ..... 5, 6

Legislative Material

House Report No. 103-180, reprinted in 1994 U.S. Code Cong. & Ad. News 818-23, 1088-89 3

No. 95-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

ALASKA AIRLINES, INC., AMERICAN AIRLINES, INC., DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., and UNITED AIR LINES, INC.,
Petitioners,

v.

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, HENRY J. VOSS, as Director of the California Department of Food and Agriculture, and STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

PETITION FOR A WRIT OF CERTIORARI

Alaska Airlines, Inc., American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., and United Air Lines, Inc., respectfully petition for a Writ of Certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, in this case.

OPINIONS BELOW

The opinion ("Opinion") of the Court of Appeal of the State of California, Second Appellate District, is reported at 33 Cal.App.4th 506, 39 Cal.Rptr.2d 426 (1995), and is reprinted in the Appendix to this petition ("Pet. App."). The order of the Supreme Court of the State of California (Pet. App. A-16) denying Petitioners' Petition for Review of the Court of Appeal's decision has not yet been published in the official reports, but it may be found at 1995 Cal. LEXIS 4049. The decision of the Los Angeles Superior Court granting Petitioner's Motion for Summary Adjudication of Issues and for Summary Judgment (Pet. App. A-42) and the Judgment in favor of Petitioners (Pet. App. A-55) are unreported.

JURISDICTION

The Superior Court of Los Angeles County entered its decision and judgment in favor of Petitioners on July 9, 1993. The California Court of Appeal, Second Appellate District, issued its opinion and order reversing the trial court on March 27, 1995. The California Supreme Court issued its order denying review of the Court of Appeal's decision, without comment, on June 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Commerce Clause of the United States Constitution, Art. 1, § 8, cl. 3, provides, in pertinent part, that "The Congress shall have Power . . . to regulate Commerce . . . among the several States . . . ."

At the time of the judgment in this case, the Anti-Head Tax Act was set forth in 49 U.S.C. App. § 1513[1], which provided in pertinent part:

> (a) *Prohibition; exemption*
>
> No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . . .
>
> (b) *Permissible State taxes and fees*
>
> [N]othing in this section shall prohibit a State (or political subdivision thereof . . .) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and

---

[1] In 1994, while this matter was pending on appeal, Congress adopted legislation to recodify Title 49 concerning the transportation laws of the United States. As part of that recodification, former 49 U.S.C. App. § 1513 was revised and renumbered. The counterparts to former 49 U.S.C. App. §§ 1513(a) and 1513(b) are now set forth in 49 U.S.C. §§ 40116(b) and (e) and reprinted in the Appendix to this petition. (Pet. App. A-17.) The legislative history of the recodification expressly states that Congress did not intend to make any change in the substantive law of Title 49 (House Report No. 103-180, reprinted in 1994 U.S. Code Cong. & Ad. News 818-23, 1088-89), and therefore the recodification has no significance to the issues on this Petition for Writ of Certiorari. Because all of the underlying opinions refer to the statutory enumeration and language of former 49 U.S.C. App. § 1513, Petitioners shall refer to those provisions for ease of reference and consistency throughout this brief.

other service charges from aircraft operators for the use of airport facilities.

The California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act (Pet. App. A-21) is codified in California Food and Agricultural Code Sections 5350-5353. These statutes provide in pertinent part:

> **§ 5350. Inspection program at airports and maritime facilities**
>
> (a) The director shall establish a program for the inspection of conveyances entering California through airport and maritime facilities to prevent the introduction into, or the spread within, this state of pests.
>
> (b) The director shall maintain plant quarantine inspection stations at points of entry at airports and marine terminals pursuant to Section 5341.
>
> (c) The director shall establish a program for the dissemination of information at airports and marine terminals in order to provide the users of the facilities information regarding the pest control and quarantine requirements of this state.
>
> * * *
>
> **§ 5351. Service charge on air carriers**
>
> (a) The director shall levy a service charge, to the extent authorized by subsection (b) of Section 1513 of Title 49 of the United States Code, based on the schedule established pursuant to Section 5353, on each air carrier or foreign air carrier engaged in foreign air commerce, as those terms are defined by Section 5353,

for the use of airport facilities for plant and animal pest inspection, quarantine, and eradication.

* * *

§ 5353. Schedule of fees for air and marine carriers

(a) Each air carrier or foreign air carrier engaged in foreign air commerce which carries animals or plants or other materials which are, or are likely to be, infected or infested with any pest shall pay a charge of eighty-five dollars ($85) to the director upon the initial landing in this state of each flight of the carrier which originates outside the United States.

* * *

(e) The charges and fees collected pursuant to this section shall be deposited in the Department of Food and Agriculture Fund and shall be used by the director for the purposes of this section and Section 5350.

(f) The director may, by regulation, increase or decrease any of the charges or fees prescribed in subdivision (a) or (b) upon determining that the revenue received is inadequate or in excess of the amount needed to conduct an effective inspection program. The maximum adjusted charge or fee shall not exceed three times the amount of the charge or fee specified in subdivision (a) or (b).

The regulation of the California Department of Agriculture (Cal. Code Regs., tit. 3, § 3560) (Pet. App. A-28), provides in pertinent part:

(a) Pursuant to sections 5351 and 5353(a), each air carrier or foreign air carrier shall pay a service charge of eighty-five dollars ($85) to the Director upon the initial landing in California of each flight of the carrier which originated outside the United States from a country to

which a current United States Department of Agriculture quarantine or California Department of Food and Agriculture quarantine is applicable, or which made an intermediate stop on that flight in such a country.

STATEMENT

On September 30, 1990, the Governor of the State of California signed into law the California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act ("the Act"), California Food and Agricultural Code § 5350 *et seq.* (Pet. App. A-21.) Under the Act, the California Department of Food and Agriculture (the "Department") and the Director of the Department (the "Director") are authorized to impose a fee of $85 on every air carrier arriving in California from anywhere outside the United States that is the subject of a quarantine order (the "Inspection Fee"). California Food & Agricultural Code §§ 5351(a), 5353(a). The Inspection Fee is imposed by a governmental entity, the State of California, that does not own or operate any of the airports at which the fees are imposed. (Pet. App. A-44, ¶ B.2.)

The $85 Inspection Fee is for plant and animal pest inspection, quarantine and eradication. California Food and Agricultural Code §§ 5351(a), 5353(a) (Pet. App. A-24 and A-25). It is not for the use of airport facilities. (Opinion, Pet. App. A-13.) After the Act was enacted, the Director promulgated regulations thereunder on April 1, 1991, which are set forth in Title 3, California Code of Regulations § 3560 (the "Regulations"). (Pet. App. A-28.)

Petitioners Alaska Airlines, Inc., American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., and United Air Lines, Inc. ("Petitioners") filed suit in the Los Angeles Superior Court on January 24, 1992, seeking declaratory relief that the Act and the Regulations were invalid and unenforceable, as well as restitution of all Inspection Fees

paid and an injunction against further collection of the Inspection Fees. In less than two years, Petitioners were compelled to pay aggregate Inspection Fees in excess of $2.7 million through July 1993, and they continue to pay the Inspection Fees to the present. Petitioners filed their first amended complaint on June 17, 1992. (Pet. App. A-30.) Petitioners alleged that the Act and the Regulations were invalid and unenforceable on a number of grounds, including that they were prohibited by federal law under the Anti-Head Tax Act, 49 U.S.C. App. § 1513. Thus, in paragraph 22 of their first amended complaint, Petitioners alleged:

> Plaintiffs desire a judicial determination of their respective rights and duties with respect to the Regulations. In particular, plaintiffs desire a declaration that the Inspection Fee and the Regulations violate and conflict with 49 U.S.C. Section 1513(a). (Pet. App. A-35.)

On January 8, 1993, Petitioners filed their motion for summary adjudication of issues and for summary judgment directed, among other things, at the cause of action seeking declaratory relief that the Inspection Fee was prohibited by the Anti-Head Tax Act. (C.T. 358.[2]) Former 49 U.S.C. App. § 1513(a), which was the statute applicable at the time of the trial court's ruling, states in pertinent part:

> No state (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of person's traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . . .

The trial court, after taking the motion for summary judgment under submission for more than three months,

---

[2]C.T. refers to the Clerk's Transcript in the proceedings below.

issued its minute order granting the motion. (C.T. 559.) The court held, among other things, that the Act and the Regulations were prohibited by the Anti-Head Tax Act and awarded Petitioners restitution of all Inspection Fees paid and enjoined the collection of any further Inspection Fees. The court's formal order granting the motion and the court's judgment were entered on July 9, 1993. (Pet. App. A-42 and A-55.)

The Department, the Director and the State of California (collectively "Respondents") appealed. The California Court of Appeal reversed the decision of the trial court. The court of appeal concluded that the Inspection Fee is not subject to the provisions of Section 1513(a), whose prohibition it viewed as limited to fees bearing "some rational relation to persons or the carriage of persons travelling in air commerce." (Pet. App. A-11.) The court held that because the Inspection Fee is charged on all commercial planes arriving in California from a foreign country, regardless of whether those planes carry passengers, the Inspection Fee is therefore based on criteria other than "persons or the carriage of persons traveling in air commerce." (Court of Appeal Opinion ("Opinion"), Pet. App. A-10.)

Petitioners filed a petition for review with the California Supreme Court on April 7, 1995. That petition was denied without comment on June 22, 1995. (Pet. App. A-16.)

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW LIMITING THE COVERAGE OF SECTION 1513(a) TO FEES RELATING ONLY TO THE TRANSPORTATION OF PERSONS IS CONTRARY TO THIS COURT'S DECISIONS IN *ALOHA AIRLINES* AND *NORTHWEST AIRLINES*.

This Court should grant this Petition for a Writ of Certiorari because the decision of the court of appeal decided an important question of federal law concerning the scope and application of a federal statute, the Anti-Head Tax Act, 49 U.S.C. App. § 1513 (presently, 49 U.S.C. § 40116), in a way that conflicts with the decisions of this Court in *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. ____, 114 S.Ct. 855, 127 L.Ed.2d 183 (1994), and *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 104 S.Ct. 291, 78 L.Ed.2d 10 (1983).[3]

In *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 104 S.Ct. 291, 78 L.Ed.2d 10 (1983), this Court discussed the legislative history of 49 U.S.C. App. § 1513. In 1970, Congress had imposed a federal tax upon all airline tickets and air freight. In 1972, this Court held that state and local governments were not preempted by federal legislation from imposing additional taxes and fees on air transportation. See *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972). In response, Congressional hearings were held and, as this Court summarized, "Both Committees concluded that the proliferation of local taxes *burdened interstate air transportation*, and, when coupled with the federal Trust Fund levies, imposed double taxation on air travelers." *Aloha*, 464 U.S. at 9, 104 S.Ct. at 293, 78

---

[3]The court below correctly noted that the essential facts in this action are undisputed and that the issues presented are questions of law involving the interpretation of the State Act and 49 U.S.C. App. § 1513. (Opinion, Pet. App. A-8.)

L.Ed.2d at 13 (emphasis added). These hearings resulted in the adoption of 49 U.S.C. App. § 1513, the Anti-Head Tax Act.

Based on the language of the Act, as construed in light of this history, the Court in *Aloha Airlines* struck down a state "tax of four per cent of . . . gross income each year from the airline business," as it was applied to two airlines carrying "passengers, freight, and mail." *Aloha*, 464 U.S. at 10, 104 S.Ct. at 293, 78 L.Ed.2d at 14.

Contrary to the reasoning and ruling of this Court in *Aloha Airlines* that 49 U.S.C. App. § 1513(a) applies to fees levied on the transportation of both passengers and freight, the court of appeal wrongly concluded that the statute was directed only against fees that "bear some rational relation to persons or the carriage of persons traveling in air commerce." (Opinion, Pet. App. A-11.) The court below did not cite *any* authority to support this conclusion. Indeed, the legislative history of the federal statute is to the contrary. Congress was concerned not solely with the burden of such local taxes on passengers, but rather the burden on the entire "interstate air transportation" system. *Aloha*, 464 U.S. at 9, 104 S.Ct. at 293, 78 L.Ed.2d at 13.[4]

The court of appeal myopically focused solely upon the order of the trial court, which held that the Inspection Fees were prohibited by § 1513(a) because they constituted an impermissible charge "on persons traveling in air commerce" or "on the carriage of persons traveling in air commerce." In Petitioners' appellate briefs, however, in response to arguments that the Inspection Fee did not violate § 1513(a) because it was imposed on cargo flights as

---

[4]This Court in *Aloha* also expressly rejected the argument that a tax measured by gross receipts was permissible under 49 U.S.C. App. § 1513 because the tax was imposed on air carriers and not on air passengers. 464 U.S. at 11-12, 104 S.Ct. at 293-294, 78 L.Ed.2d at 14-15.

well as passenger flights, Petitioners pointed out that § 1513(a) also prohibited fees "on the sale of air transportation" and that the statutory definition of "air transportation" included the carriage by air of passengers *or property* for compensation. 49 U.S.C. App. §§ 1301(10) and (24) (presently 49 U.S.C. §§ 40102(5) and (23)). The court of appeal, however, failed to address or analyze the applicability of that portion of § 1513(a). (See Opinion, Pet. App. A-6, n. 4.)

In *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. ____, 114 S.Ct. 855, 127 L.Ed.2d 183 (1994), this Court established a straight-forward approach to the analysis of challenges under the Anti-Head Tax Act, which the court below failed to follow. Rejecting the argument that Section 1513(a) is limited to "direct head taxes,"[5] this Court explained the relationship between Sections 1513(a) and (b):

> Sections 1513(a) and (b) together instruct that airport user fees are permissible only if, and to the extent that, they fall within § 1513(b)'s saving clause, which removes from § 1513(a)'s ban "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities."

Northwest, 510 U.S. at ____, 114 S.Ct. at 862, 127 L.Ed.2d at 194. This Court further held, "The statute, in sum, is hardly ambiguous on this matter: User fees are covered by § 1513(a), but may be saved by § 1513(b)." *Northwest*, 510 U.S. at ____, 114 S.Ct. at 862, n.9, 127 L.Ed.2d at 195, n. 9. Moreover, this Court concluded that the prohibitions of Section 1513(a) are written broadly, while the "saving"

---

[5]Thus, the lower court's conclusion "that the inspection fee is not a direct head tax" (Opinion, Pet. App. A-10) wholly begs the relevant question.

clause of Section 1513(b) is narrow. *Northwest*, 510 U.S. at ____, 114 S.Ct. at 867, n. 13, 127 L.Ed.2d at 196, n. 13.[6]

Without making any distinction between the passenger and freight services provided by commercial air carriers, this Court in *Northwest* held that the "landing fees, terminal charges, and other airport user fees" at issue there came within the scope of Section 1513(a). *Northwest*, 510 U.S. at ____, 114 S.Ct. at 862, 127 L.Ed.2d at 194.[7]

---

[6]A plethora of authority preceding *Northwest* had indicated that the *only* user fees permitted under 49 U.S.C. App. § 1513 are those expressly authorized by § 1513(b). See *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262, 1265 (7th Cir. 1984); *Denver v. Continental Airlines, Inc.*, 712 F.Supp. 834, 840 (D.Colo. 1989); *Rocky Mountain Airways, Inc. v. County of Pitkin*, 674 F.Supp. 312 (D.Colo. 1987) ("Thus, Section 1513(a) is a broadly worded prohibition of any kind of indirect charge on the carrying of persons in air commerce. Section 1513(b) then lays out certain exceptions to this broad prohibition."). As discussed below in Section II, the Inspection Fee does not fall within the "saving" clause of Section 1513(b).

[7]This application of § 1513(a) to the fee at issue in *Northwest* remains part of the holding of the case notwithstanding the Court's subsequent conclusion that the fees were permissible pursuant to § 1513(b).

As in *Aloha* and *Northwest*, in both the *Denver* and *Rocky Mountain* cases, the fees at issue were imposed on all commercial flights, not just passenger flights. *Denver*, 712 F.Supp. at 835; *Rocky Mountain*, 674 F.Supp. at 314. See also *Republic Airlines, Inc. v. Department of Treasury*, 169 Mich.App. 674, 427 N.W.2d 182, 186-87 (1988). Indeed, in *Airborne Freight Corp. v. New York State Department of Taxation and Finance*, 137 A.D.2d 30, 527 N.Y.S.2d 107, 108 (1988), a New York appellate court held that Section 1513(a) prohibited the imposition of a gross receipts tax upon an air express transportation company that handled *only* cargo and no passengers:

> It seems patently clear that the tax defendants have sought to impose herein on the allocable New York shares of plaintiffs' gross receipts for inter-state transportation, in fact, is levied upon receipts at least a portion of which are for air transportation of packages and

Here, the imposition of the Inspection Fee results from the "initial landing in this state" of an international flight of an air carrier. California Food and Agricultural Code § 5353(a). Were the fee assessed on a per passenger basis, no one could doubt that it is covered by § 1513(a). There is no authority to support the court of appeal's conclusion that fees imposed on a per plane basis, without regard to the presence or number of passengers, do not fall within the provisions of 49 U.S.C. App. § 1513(a).

The court of appeal set forth the following factors to support its conclusion that the Inspection Fee was not subject to the provisions of Section 1513(a):

> The undisputed facts presented to the trial court established that the fees are based on criteria other than the number of passengers carried; that the fees are also imposed on non-passenger flights; that the fees do not vary depending on the number of passengers or passenger receipts; that inspections are also performed on air cargo and air freight operations; that the fee is charged even if the airplane is empty; . . .[8]

(Opinion, Pet. App. A-10.) None of these factors is relevant to the applicability of § 1513(a) under the analysis of this Court in *Northwest Airlines*. The question is simply whether it is clear, as here, that the fee is being imposed on the landing of a commercial aircraft, regardless of whether the aircraft carries passengers or cargo or both.

---

freight of plaintiffs' customers. Therefore, the Federal exemption as to such taxation 'directly or indirectly' clearly applies . . . .

[8]There is no evidence in the record whatsoever that Petitioners ever flew an "empty plane" from a foreign country to an airport in California or that an Inspection Fee was ever imposed on an "empty plane." Thus, this factor is entirely hypothetical. It is also irrelevant to the determination of the issues on this petition, since at most it supports an argument that the Inspection Fee might be valid when imposed on aircraft carrying neither passengers nor freight.

The correctness of this conclusion is demonstrated by the fact that Section 1513(a) prohibits any direct or indirect charge "on the sale of air transportation." Title 49 defines "air transportation" as "the transportation of persons *or property* by aircraft as a common carrier for compensation ...." 49 U.S.C. §§ 40102(5) and (23) (emphasis added).[9] Thus, the unambiguous terms of the federal legislation make clear that it applies to fees, like the one at issue here, which reach non-passenger flights and air cargo operations as well as passenger flights.

II. THE INSPECTION FEE DOES NOT FALL WITHIN THE "SAVING" CLAUSE OF SECTION 1513(b).

49 U.S.C. App. § 1513(b) states, in pertinent part:

> [N]othing in this section shall prohibit a State (or political subdivision thereof ...) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

The decision of the California Court of Appeal conceded that, if the Inspection Fee was covered by § 1513(a), it would not be saved by the user fee exception of § 1513(b), since it is not imposed in order to support the airport facilities. (Opinion, Pet. App. A-13.) In that respect, the court was surely correct.

The Inspection Fees are not "for the use of airport facilities." All of the authorities addressing this language involve matters that obviously relate to the use of the airport as an airport, such as landing fees and terminal costs.

---

[9]These sections replaced former 49 U.S.C. App. §§ 1301(10) and (24) in the 1994 recodification of Title 49.

For example, in *Denver v. Continental Airlines, Inc.*, 712 F.Supp. 834 (D.Colo. 1989), the City and County of Denver, as the owner of an international airport, imposed certain fees on the airlines in order to help fund the construction of a proposed new airport. Two airlines challenged the imposition of these fees on the grounds that they were not authorized by 49 U.S.C. App. § 1513(b) because the fees were not "for the use of airport facilities" but rather to fund the construction of a new airport. The court held that the fees were improper because they were not "to be used to operate and maintain the presently existing airport facilities." *Denver*, 712 F.Supp. at 840. The court stated, "Since the airlines are unable to use airport facilities which do not yet exist, Denver cannot charge them and their passengers for any costs connected with a replacement facility before that facility is in use." *Id.* The court then concluded, "Such charges are unreasonable as a matter of law because they do not relate to the present use of the existing public facility." *Id.*

The Inspection Fee here has even less relationship to the "use of airport facilities" than the fee that was at issue in *Denver*. The purpose of the Inspection Fee has nothing to do with the use of airport facilities. Rather, it is imposed to protect the people of the State of California from the introduction of exotic pests.[10] Moreover, the Inspection Fee

---

[10]This legislative purpose is manifest from the legislative findings and declarations in Section 2 of the Act. Section 2(a) states, "The introduction of exotic plants and animal pests poses a serious threat to the health, safety, and economic well being of the People of this State." (Pet. App. A-23.) Section 2(c) then states, "The inspection or removal of exotic pests from air and marine conveyances is a necessary and reasonable service provided by the State and its political subdivisions." (Pet. App. A-23.) Similarly, in declaring the Act to be an urgency statute that would go into effect immediately, the Legislature provided in Section 8 of the Act, "In order to protect the People and the environment from repeated application of pesticides and to protect California agriculture

is imposed by the State, which does not "own or operate" any of the airports where the Inspection Fees are imposed. (Pet. App. A-44, ¶ B.2.)

Thus, the Inspection Fee clearly does not fall within the "saving" clause of Section 1513(b), and it is thereby prohibited by the Anti-Head Tax Act.

III. THE DECISION BELOW, IF ALLOWED TO STAND, WILL BE HIGHLY DISRUPTIVE TO INTERSTATE AND INTERNATIONAL AIR COMMERCE.

The court of appeal's decision, if allowed to stand, extends to state and local governments an open invitation to raise revenue and avoid the strictures of the Anti-Head Tax Act through the mere expediency of imposing charges on all commercial flights on a per plane basis, rather than on a per passenger basis or just on passenger flights. As a result, the court of appeal's decision would emasculate the Anti-Head Tax Act, and impose a substantial financial and administrative burden on interstate and foreign air commerce.

Indeed, the decision below creates an absurd and anomalous situation where state and local governments may, on the one hand, impose fees "for the use of airport facilities" only if they are reasonable under 49 U.S.C. App. § 1513(b) (i.e., they approximate the reasonable costs of the benefit conferred on users of the airport, as this Court held in *Northwest*, 510 U.S. at ____, 114 S.Ct. at 857, 127 L.Ed.2d at 196-97), but on the other hand, the governmental entities may impose any charges, reasonable or not, for purposes *unrelated* to the use of airport facilities, so long as the charges are imposed on all planes in a specified category

---

from pests as soon as possible, it is necessary that this act take effect immediately." (Pet. App. A-27.)

(such as flights from a foreign country) and not just on passenger planes.

For example, under the reasoning of the court of appeal's decision, a municipality might well be allowed to impose fees on aircraft landings without running afoul of the restrictions of the Anti-Head Tax Act to (1) subsidize passengers to use buses or vans to travel to or from the airport, (2) purchase buses and vans for airport transportation, (3) build a mass transit system to the airport, (4) widen streets and intersections near the airport, (5) mitigate the pollution caused by aircraft operations, (6) support police and fire services throughout the community, or (7) help bring tourism into the area. Clearly, the Anti-Head Tax Act and this Court's decisions in *Northwest* and *Aloha* were intended to prevent state and local governments from using foreign and interstate air transportation as a source of revenue for such projects unrelated to the use of the airport as an airport.

The potential financial impact on the airline industry of the court of appeal's decision is enormous. The impact on Petitioners themselves, while substantial, is only the tip of the iceberg. The five Petitioners, alone, were obligated to pay aggregate Inspection Fees of more than $2.7 million in California for a period of less than two years. Foreign air carriers flying into California airports have also been required to pay substantial Inspection Fees. If the decision below is allowed to stand, other cash-strapped state and local governments will undoubtedly look to airline landings as a new source of revenue and begin imposing similar fees. The resulting proliferation of charges, based on the reasoning of the court of appeal's decision, could well defeat entirely the purposes of the Anti-Head Tax Act.

If permitted to stand, the court of appeal's decision could also prompt foreign countries, whose air carriers are now and in the future subject to the Inspection Fee (and possibly

additional local fees and charges to be imposed by other state and local governments, based on the reasoning of the decision below), to retaliate against United States air carriers flying to those countries.

CONCLUSION

For all the foregoing reasons, Petitioners request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

Of Counsel:
DONALD B. AYER
JONES, DAY, REAVIS & POGUE
Metropolitan Square
1450 G. Street, N.W.
Washington, D.C. 20005
(202) 879-3939

September 1995

BURT PINES
(Counsel of Record)
JOHN A. SCHWIMMER
ALSCHULER, GROSSMAN & PINES
2049 Century Park East
39th Floor
Los Angeles, CA
90067-3213
(310) 277-1226
Counsel for Petitioners

PETITIONERS' APPENDIX

		Page
A.	Decision of the California Court of Appeal, Second Appellate District, filed March 27, 1995	A-2
B.	Order of the California Supreme Court Denying Petition for Review, filed June 22, 1995	A-16
C.	Federal Anti-Head Tax Act (present version) 49 U.S.C. § 40116	A-17
D.	California Airport and Maritime Plant Quarantine, Inspection and Plant Protection Act, adopted September 30, 1990	A-21
E.	California Department of Food and Agriculture Regulation, adopted April 1, 1991 Title 3, California Code of Regulations, Section 3560	A-28
F.	First Amended Complaint for Declaratory Relief, Injunctive Relief, and Restitution, filed June 17, 1992	A-30
G.	Order Granting Motion for Summary Adjudication of Issues and for Summary Judgment, filed July 9, 1993	A-42
H.	Judgment by Court, filed July 9, 1993	A-55

APPENDIX A

B076888

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

ALASKA AIRLINES, INC. et al.,
Plaintiffs and Respondents,

v.

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; HENRY J. VOSS, as Director, etc.; et al.,
Defendants and Appellants.

(Super. Ct. No. BC047104)
FILED
March 27, 1995

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick J. Lower, Jr., Judge. Reversed.

Daniel E. Lungren, Attorney General of the State of California, Roderick E. Walston, Chief Assistant Attorney General, Walter Wunderlich, Senior Assistant Attorney General, Douglas B. Noble, Acting Senior Assistant Attorney General, Charles W. Getz, Supervising Deputy Attorney General, and John Davidson, Deputy Attorney General, for Defendants and Appellants.

Alschuler, Grossman & Pines, Burt Pines, and John A. Schwimmer for Plaintiffs and Respondents.

This is an appeal from a summary judgment ordering the California Department of Food and Agriculture ("the Department") to return service charges collected from the

respondent airlines and enjoining the Department from collecting such charges in the future.

INTRODUCTION

The service charges were levied pursuant to the California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act (the "Act") which has as its laudable purpose "inspection of conveyances entering California through airport and maritime facilities to prevent the introduction or spread within . . . [California] of pests."[1] (Food & Agr. Code, § 5350, subd. (a).)

The Act, adopted in 1990 as an urgency measure in response to the 1989-1990 Mediterranean fruit fly infestation and codified as Food and Agricultural Code sections 5350-5353, authorizes the Director of the Department of Food and Agriculture ("the Director") to identify and establish a list of foreign countries which the Director believes are potential sources of exotic plant or animal pests. Conveyances, i.e. aircraft or ships, arriving from such locations and carrying animals, plants or other materials which are, or are likely to be, infested with any pest are inspected at a plant quarantine inspection station located at airports and marine terminals and assessed a "service charge" of $85, in the case of aircraft, and $200, in the case of ships,

---

[1]The Food and Agricultural Code defines "pest" as follows: " 'Pest' means any of the following things that is, or is liable to be, dangerous or detrimental to the agricultural industry of the state:

(a) Any infectious, transmissible, or contagious disease of any plant, or any disorder of any plant which manifests symptoms or behavior which the director, after investigation and hearing, finds and determines is characteristic of an infectious, transmissible, or contagious disease.

(b) Any form of animal life.

(c) Any form of vegetable life." (Food & Agr. Code, § 5006.)

upon initial arrival in California. (Food & Agr. Code, § 5353, subd. (a).)[2]

Charges and fees collected pursuant to the Act are to be deposited in a special fund to be used by the Director for the purposes of the Act. (Food & Agr. Code, § 5353, subd. (e).) The Director is authorized to contract with federal and state agencies to assist the Director in carrying out the purposes of the Act. (Food & Agr. Code, § 5353, subd. (e).) The Director has entered into an agreement with the United States Department of Agriculture whereby the inspection fees are turned over to that agency to help pay for federally mandated pest inspections. The Director is authorized by Food and Agricultural Code section 5351, subdivision (a) ("section 5351(a)") to levy the service charge "to the extent authorized by subsection (b) of Section 1513 of Title 49 of the United States Code," the Federal Anti-Head Tax Act ("AHTA"). Because the lan-

---

[2]California is much concerned with the possibility of pests arriving from outside its boundaries. Accordingly, California has adopted comprehensive regulations to protect its agricultural industry from pests and has provided for an elaborate system of plant quarantines and inspections. The Legislature has authorized the Director to establish, maintain and enforce such quarantine regulations as are deemed necessary to protect the agricultural industry from pests (Food & Agr. Code, § 5301), including the making and enforcing of such regulations to prevent any plant or thing which is, or is liable to be, infested or infected from passing over a quarantine line. (Food & Agr. Code, § 5302.) Plant quarantines are authorized. (Food & Agr. Code, § 5341.) Every operator of a motor vehicle entering the state with a shipment of an agricultural commodity shall cause the vehicle and shipment to be inspected. (Food & Agr. Code, § 5341.5.) Violation of some of these protective measures are misdemeanors. (See, Food & Agr. Code, § 5341.5, subd. (d).)

guage of the AHTA is critical to our opinion, we quote the relevant portion in full here:

The AHTA as originally adopted by Congress provides in pertinent part:[3]

> "§ 1513. State taxation of air commerce
>
> Prohibition; exemption
>
> (a) No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . . .
>
> Permissible State taxes and fees
>
> (b) Nothing in this section shall prohibit a State (or political subdivision thereof . . .) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities."

Respondent air carriers approve generally of the Act and do not object to the inspection program, but they do object

---

[3]The AHTA was recodified in 1994. It is now codified as section 40116 of title 49, United States Code. Section 1513(a) was restated as subsection (b) of section 40116. The words "directly or indirectly" appearing in subsection (a) of section 1513 were omitted as surplus. (Historical and Statutory Notes, 49 U.S.C.A. § 40116.) The parties share the view that the omission of the words "directly or indirectly" is of no significance.

to the payment of the $85 service charge. They filed this declaratory relief action alleging that the service charges assessed by the Director were invalid because not authorized by the Act and further, that the charges are prohibited under the federal preemption doctrine by the AHTA. Respondents' motion for summary adjudication on each of these grounds was granted.

In its order granting respondents' motion, the court interpreted the Act to mean that the Director was granted the power to collect the inspection fee under section 5351(a) of the Act, but only to the extent authorized by section 1513, subsection (b) ("section 1513(b)") of the AHTA. The court found that the following matters were established, presenting no triable issues of material fact: The fee collected by defendants is not a tax described in section 1513(b); the State does not own or operate any of the airports at which the fee is charged to the respondents; the fee is not imposed for the use of airport facilities or for the present operation or maintenance of existing airport facilities. From these facts the court concluded that the fee is not authorized by section 1513(b) of the AHTA. Moreover, because the Act specifically provides that the Director may levy a service charge only "to the extent authorized by subsection (b)," the court determined that respondents' collection of the fee violates the Act.

The court also concluded that the fee was impermissible under section 1513, subsection (a) ("section 1513(a)") of the AHTA because the fee "constitutes a fee or charge on the carriage of persons travelling in air commerce and an indirect fee or charge on persons travelling in air commerce."[4] In connection with this issue, the court found that

---

[4]The trial court made no finding regarding whether the inspection fee constitutes a tax or charge on the sale of air transportation or on gross receipts. We express no view on these questions.

the fees charged are passed on to air passengers by the plaintiffs.

Because the order granting summary adjudication was dispositive of the action, the trial court entered a summary judgment awarding respondents restitution of all service charges paid, enjoining the collection of service charges in the future, and dismissing the remaining causes of action at respondents' request. The trial court also dismissed a cross-complaint filed by appellant against Northwest Airlines, Inc.

Appellants contend that the trial court erred in its determination that the service charge authorized by the Act is an impermissible "tax, fee, head charge, or other charge" levied directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce within the meaning of section 1513(a). Appellants further maintain that, because the fee does not fall within those impermissible charges set forth in section 1513(a), it does not violate section 5351(a) of the Act.[5]

Respondents counter that the inspection fee is a "tax, fee, head charge, or other charge" within the meaning of section 1513(a) and thus violates the AHTA. Respondents also contend that because the fee is not one authorized by section 1513(b), the service charge is being levied in violation of the Act.

---

[5]In addition, appellants argue that respondents have no standing to sue, since they have no right to enforce the AHTA through a private right of action but must pursue administrative remedies, which would then be subject to judicial review. We concur with respondents that this issue was not raised in the summary adjudication proceedings below, and thus is not properly before us on appeal. Moreover, contrary to appellants' position, the issue is not jurisdictional. (*Northwest Airlines, Inc. v. County of Kent, Michigan* (1994) ____ U.S. ____, 114 S.Ct. 855, 862 ["The question whether a federal statute creates a claim for relief is not jurisdictional"].)

The essential facts relating to these issues are undisputed; thus, the issue presented is a question of law involving the interpretation of the two relevant statutes, a matter subject to our independent review. (*Engs Motor Truck Co. v. State Bd. of Equalization* (1987) 189 Cal.App.3d 1458.)

DISCUSSION

The Anti-Head Tax Act

We begin our discussion with a brief history of the AHTA. In *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, (1972) 405 U.S. 707, the airport had established a "use and service charge of One Dollar ($1.00) for each passenger enplaning any commercial aircraft operating from" the airport. The airline challenged the constitutionality of the charge on the ground that it placed an unreasonable burden on interstate commerce in violation of the Commerce Clause, Article I, section 8, of the Federal Constitution. The court held that the Commerce Clause does not prohibit States or municipalities from charging commercial airlines a reasonable "head tax" on passengers boarding flights at airports within the jurisdiction, to defray the costs of airport construction and maintenance. The court noted: "No federal statute or specific congressional action or declaration evidences a congressional purpose to deny or pre-empt state and local power to levy charges designed to help defray the costs of airport construction and maintenance." (*Id.* at p. 721.) Concerned that local agencies in response to the decision in *Evansville* might enact "new, inequitable, and potentially chaotic" head taxes or other charges on persons who use air transportation, thereby burdening interstate air transportation and inhibiting the flow of interstate commerce (and, when coupled with federal levies for airport construction, impose double taxation on air travelers), Congress enacted the AHTA in 1973. (S. Rep. No. 93-12, p. 4 (1973); see, generally, *Northwest*

Airlines, Inc. v. County of Kent, Michigan (1994) ____ U.S. ____, 114 S.Ct. 855, and *Aloha Airlines, Inc. v. Director of Taxation of Hawaii* (1983) 464 U.S. 7, 9-10.)

Legislative history makes clear that Congress did not intend to prohibit all state taxes or charges on air carriers:

> "The Senate's first proposal to limit state taxation would have prohibited *any* state tax — direct or indirect — on air transportation. S. 3611, 92d Cong.2d Sess. (1972); see also H.R. 2337, 92nd Cong., 1st Sess. (1971) (similar prohibition). The States, however, complained loudly at the hearings that this sweeping provision would prohibit even unobjectionable taxes such as landing fees, fuel taxes, and sales taxes on food provided to airline passengers. E.g., House Hearings, at 91 (statement of John A. Nammack, Executive Vice President, National Association of State Aviation Officials) .... In reply, Members of Congress assured these officials that the prohibition was intended to apply only to 'head taxes' and the like, and that some clarification of the bill's intent would be in order. (Citation.) The final bill enacting § 1513 therefore appears to be a compromise following careful consideration by Congress as to the permissible scope of state taxation in the area of air commerce." *Wardair Canada Inc. v. Florida Department of Revenue* (1986) 477 U.S. 11, 15-16 (opinion of Burger, C.J. concurring in part and concurring in the judgment.)

The final bill reflected this compromise. "We find no paradox between § 1513(a) and § 1513(b). Section 1513(a) pre-empts a limited number of state taxes, including gross receipts taxes imposed on the sale of air transportation or the carriage of persons traveling in air commerce. Section 1513(b) clarifies Congress's view that the States are still free to impose on airlines and air carriers 'taxes other than those enumerated in subsection (a),' such as property

taxes, net income taxes, and franchise taxes." (*Aloha Airlines, Inc. v. Director of Taxation, supra*, 464 U.S. 7, 12, fn. 6.)

The Inspection Fee Is Not A Head Tax Preempted By The AHTA

The trial court concluded that the inspection fee levied under the Act constitutes a fee or charge on the carriage of persons traveling in air commerce and an indirect fee or charge on persons traveling in air commerce. The undisputed facts presented to the trial court established that the fees are based on criteria other than the number of passengers carried; that the fees are also imposed on non-passenger flights; that the fees do not vary depending on the number of passengers or passenger receipts; that inspections are also performed on air cargo and air freight operations; that the fee is charged even if the airplane is empty; and that the amount of fee is subject to change or elimination by the director under an incentive program in which the airlines may participate, or pursuant to a request for exemption.

These facts establish that the inspection fee is not a direct head tax. It bears no relation to the number of passengers or cargo on the aircraft, nor does it bear direct or indirect relation to persons or the carriage of persons traveling in air commerce, or the receipts derived therefrom. These facts also establish that the purpose and effect of the fee is to fund the inspection of foreign-sourced conveyances for pests, not to mask a charge otherwise prohibited by section 1513(a). (Cf. *Aloha Airlines, Inc. v. Director of Taxation of Hawaii, supra*, 464 U.S. at pp. 13-14 ["The manner in which the state legislature has described and categorized [the tax] cannot mask" a forbidden levy].)

Respondents argue that the fee becomes a part of the cost of operating the airline, which costs are passed on to passengers in the form of increased fares. Thus, respondents

claim there is an indirect levy on persons traveling in air commerce or on the carriage of persons traveling in air commerce. Although the inspection fee may have the effect of increasing the operational costs of the airline and thereby increasing the average fare per passenger, this is a cost which is unrelated to the AHTA prohibitions. For the fee to be prohibited, it must bear some rational relation to persons or the carriage of persons traveling in air commerce. A fee which is based on other criteria is permitted, although passed on to passengers in the form of increased fares. (*United Air Line Inc. v. County of San Diego* (1991) 1 Cal.App.4th 418, 430.) The fee at issue here does not have the required relation to the carriage of persons. Rather, it is a fee for the inspection of aircraft for pests, which is imposed by virtue of the fact that the aircraft arrive from designated quarantine areas.

In amending the Plant Quarantine Act of 1912 (7 U.S.C. § 151), Congress recognized the threat posed to the states by plant disease and insect infestation from plant and animal products which enter their borders, and specifically sanctioned state efforts to quarantine, prohibit or restrict the transportation of such products. (See generally *Guam Fresh, Inc, v. ADA* (9th Cir. 1988) 849 F.2d 436.) Furthermore the United States Supreme Court has specifically upheld the validity of state inspection laws and the imposition of reasonable inspection fees. "In the exercise of its police power a State may enact inspection laws, which are valid if they tend in a direct and substantial manner to promote the public safety and welfare or to protect the public from frauds and imposition when dealing in articles of general use, as to which Congress has not made any conflicting regulation, and a fee reasonably sufficient to pay the cost of such inspection may constitutionally be charged, even though the property may be moving in interstate commerce when inspected." (*Pure Oil Co. v. State of Minnesota* (1918) 248 U.S. 158, 161-162; cf. *Evansville-Vanderburgh Airport Authority Dis-*

trict v. Delta Airlines, Inc., supra, 405 U.S. 707.) Given this context of Congressional and judicial approval of inspection fees such as the one at issue here, we find nothing in the AHTA or its legislative history which indicates that Congress intended the AHTA to prohibit the inspection fee imposed pursuant to the Act.

The Inspection Fee Does Not Violate the Act

According to respondents, even if the inspection fee is not incompatible with the AHTA, it still violates the Act since the fee is not a fee for the use of airport facilities authorized by section 1513(b) as required by section 5351(a) of the Act. While respondents' position has some superficial appeal, we conclude that it does not survive careful scrutiny.

As noted above, section 1513(b) provides:

> "Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities."

With respect to user fees referred to in the second clause of section 1513(b), the Supreme Court has held that: "Sections 1513(a) and (b) together instruct that airport user fees are permissible only if, and to the extent that, they fall within 1513(b)'s savings clause, which removes from 1513(a)'s ban 'reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.' " (*Northwest Airlines, Inc. v. County of Kent*, Michigan, supra, 114 S.Ct. 855, 862.) A fee or charge "for the use of airport facilities" is one the proceeds of

which are used to help defray the costs of operation, maintenance or development of airport facilities. (*City and County of Denver v. Continental Air Lines* (D. Colo. 1989) 712 F.Supp. 834, 840.) As the trial court correctly concluded, the undisputed facts establish that the proceeds of the inspection fee in question are not used for such purposes, but rather, they are used to finance an inspection programmed.[6] Therefore, as respondents maintain, the service charge is not authorized by the user fee exception found in section 1513(b).

Respondents contend that since the inspection fee is not authorized by section 1513(b), it is in violation of the very terms of the Act. We find this reading of the Act unpersuasive.

The legislative history of the Act makes clear that the Legislature intended to subject foreign plant and animal products to inspection upon entry into the State of California, as it has the right to do, and further intended to finance that inspection program with fees levied upon the carriers of the products, so long as that levy would not violate the mandate of the AHTA. For example, the June 27, 1990 Bill Analysis stated: "According to the Department, even if the bill is signed, the legal issue of federal preemption could postpone implementation of the program if commercial carriers argue that the State cannot assess fees to fund the inspection program." This concern that the fee might be preempted by the AHTA led the Legislature to characterize the fee as a user fee for publicly owned facilities (Enrolled Bill Report, dated September 12, 1990) and to suggest (by use of the phrase "to the extent authorized by subsection (b)") that the fee fell within the savings clause of

---

[6]The trial court found that: "[T]he evidence and reasonable inferences from these provisions [of the Act] reveal that the purpose of the Fees is to generate revenue to fund inspections to prevent pest infestation and thereby protect agricultural interests and the general public."

section 1513(b). As noted above, the inspection fee is not, in fact, a user fee. Thus, according to respondents, it is not authorized by the Act.

However, respondents' interpretation of the statutory language is not persuasive. According to that interpretation, the Legislature intended to authorize collection of the inspection fee if it were a valid user fee which fell within the savings clause of section 1513(b), but not if it were wholly outside the scope of the AHTA and thus not subject to challenge based on the preemptory effect of the federal statute. This reading of the Act leads to a result, which common rules of statutory construction prohibit. (*Shields v. Singleton* (1993) 15 Cal.App.4th 1611, 1620.) Moreover, it is directly contradicted by the Act's legislative history, which makes clear that the AHTA was referenced in anticipation of a challenge to the fee based on federal preemption grounds, and not in order to render the fee uncollectible in the event it were permissible under federal law because outside the scope of the AHTA. We conclude that, though the Legislature chose the words "authorized by section 1513(b)" in referring to the fees to be levied under the Act, it intended simply that the fees be "not prohibited" by the AHTA. This is a workable and reasonable construction of the Act. "As the court stated in *Harris v. Alcoholic Bev. etc. Appeals Bd.* [1961] 197 Cal.App.2d 759, 763: 'It is the duty of the courts within the framework of the statutes passed by the Legislature, to interpret the statutes so as to make them workable and reasonable.' [Citation.]" (*Regents of the University of California v. Superior Court* (1970) 3 Cal.3d 529, 536-537.)

CONCLUSION

We conclude that the trial court erred in finding that the inspection fee violates the Act and further erred in determining that the fee is a charge on persons traveling in air commerce or on the carriage of persons traveling in air commerce within the meaning of section 1513(a).[7] We therefore reverse the judgment and remand the case to the trial court for further proceedings consistent with this opinion. The writ of supersedeas is discharged. Each party to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

ARMSTRONG, J.

We concur:

TURNER, P.J.

GRIGNON, J.

---

[7]Due to this disposition, we do not address appellants' further claims of error, including the court's failure to reserve a reasonable opportunity to complete discovery and allow time to complete preparation of affirmative defenses, and the court's error in dismissing the cross-complaint against Northwest Airlines, Inc.

APPENDIX B

Second Appellate District,
Division Five,
No. B076888
S045859

IN THE SUPREME COURT OF CALIFORNIA

ALASKA AIRLINES INCORPORATED et al.,
Respondents
vs.
CALIF. DEPARTMENT OF FOOD AND AGRICULTURE
et al.,
Appellants

FILED JUNE 22, 1995

Respondents' petition for review DENIED.

LUCAS
Chief Justice

APPENDIX C

FEDERAL ANTI-HEAD TAX ACT (present version), 49 U.S.C. § 40116

§ 40116. State taxation

(a) *Definition.* — In this section, "State" includes the District of Columbia, a territory or possession of the United States, and a political authority of at least 2 States.

(b) *Prohibitions.* — Except as provided in subsection (c) of this section and section 40117 of this title, a State or political subdivision of a State may not levy or collect a tax, fee, head charge, or other charge on —

(1) an individual traveling in air commerce;

(2) the transportation of an individual traveling in air commerce;

(3) the sale of air transportation; or

(4) the gross receipts from that air commerce or transportation.

(c) *Aircraft taking off or landing in State.* — A State or political subdivision of a State may levy or collect a tax on or related to a flight of a commercial aircraft or an activity or service on the aircraft only if the aircraft takes off or lands in the State or political subdivision as part of the flight.

(d) *Unreasonable burdens and discrimination against interstate commerce.* — *(1)* In this subsection —

(A) "air carrier transportation property" means property (as defined by the Secretary of Transportation) that an air carrier providing air transportation owns or uses.

(B) "assessment" means valuation for a property tax levied by a taxing district.

(C) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(D) "commercial and industrial property" means property (except transportation property and land used primarily for agriculture or timber growing) devoted to a commercial or industrial use and subject to a property tax levy.

(2)(A) A State, political subdivision of a State, or authority acting for a State or political subdivision may not do any of the following acts because those acts unreasonably burden and discriminate against interstate commerce:

(i) assess air carrier transportation property at a value that has a higher ratio to the true market value of the property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of other commercial and industrial property.

(ii) levy or collect a tax on an assessment that may not be made under clause (i) of this subparagraph.

(iii) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate greater than the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(iv) Levy or collect a tax, fee, or charge, first taking effect after the date of the enactment of this clause, exclusively upon a business located at a commercial service airport or operating as a permittee of such an airport other than a tax, fee, or charge wholly utilized for airport or aeronautical purposes.

(B) Subparagraph (A) of this paragraph does not apply to an in lieu tax completely used for airport and aeronautical purposes.

(e) *Other allowable taxes and charges.* — Except as provided in subsection (d) of this section, a State or political subdivision of a State may levy or collect —

(1) taxes (except those taxes enumerated in subsection (b) of this section), including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and

(2) reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or operated by that State or subdivision.

(f) *Pay of air carrier employees.* — (1) In this subsection —

(A) "pay" means money received by an employee for services.

(B) "State" means a State of the United States, the District of Columbia, and a territory or possession of the United States.

(C) an employee is deemed to have earned 50 percent of the employee's pay in a State or political subdivision of a State in which the scheduled flight time of the employee in the State or subdivision is more than 50 percent of the total scheduled flight time of the employee when employed during the calendar year.

(2) The pay of an employee of an air carrier having regularly assigned duties on aircraft in least 2 States is subject to the income tax laws of only the following:

(A) the State or political subdivision of the State that is the residence of the employee.

(B) the State or political subdivision of the State in which the employee earns more than 50 percent of the pay received by the employee from the carrier.

(3) Compensation paid by an air carrier to an employee described in subsection (a) in connection with such employee's authorized leave or other authorized absence from regular duties on the carrier's aircraft in order to perform services on behalf of the employee's airline union shall be subject to the income tax laws of only the following:

(A) The State or political subdivision of the State that is the residence of the employee.

(B) The State or political subdivision of the State in which the employee's scheduled flight time would have been more than 50 percent of the employee's total scheduled flight time for the calendar year had the employee been engaged full time in the performance of regularly assigned duties on the carrier's aircraft.

APPENDIX D

CALIFORNIA AIRPORT AND MARITIME PLANT QUARANTINE, INSPECTION AND PLANT PROTECTION ACT

Senate Bill No. 2772

CHAPTER 1612

An act to add Sections 5350, 5351, 5352, and 5353 to the Food and Agricultural Code, relating to pest control, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 30, 1990. Filed with Secretary of State September 30, 1990.]

LEGISLATIVE COUNSEL'S DIGEST

SB 2772, Torres. Pest control: air carriers and foreign air carriers: marine carriers.

(1) Under existing law, the Director of Food and Agriculture is required to maintain plant quarantine inspection stations for the purpose of inspecting all conveyances which might carry plants or other things which are, or are liable to be, infested or infected with any pest to prevent the introduction into, or the spread within this state, of pests.

This bill would enact the California Airport and Marine [sic] Plant Quarantine, Inspection, and Plant Protection Act, which would require the director to establish a program for the inspection of conveyances entering California through airport and maritime facilities to prevent the introduction into, or the spread within, this state of pests, and to maintain plant quarantine inspection stations at points of entry at airports and marine terminals. The bill would permit the director to authorize inspection and certification of conveyances outside of California, as prescribed.

(2) Existing law does not require air carriers, foreign air carriers, or commercial marine carriers arriving from other countries to pay inspection fees to the director for purposes of funding pest control and eradication programs.

The bill would require air carriers and foreign air carriers engaged in foreign air commerce, as defined, to pay to the director a specified service charge for the use of airport facilities for plant and animal pest inspection upon the initial landing in this state of each flight of the carrier which originates outside the United States. The bill would also require commercial marine carriers to pay a specified fee upon the initial arrival in this state of the carrier on a voyage which originated outside the United States. The bill would require each carrier to maintain records subject to inspection by the director.

The bill would require the charges and fees to be deposited in the Department of Food and Agriculture Fund, to be used by the director for the purposes of the bill.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

Other provisions of existing law would make a violation of this bill a misdemeanor.

This bill would provide that no reimbursement is required by this act for a specified reason.

(4) This bill would declare that it is to take effect immediately as an urgency statute.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. This act shall be known and may be cited as the California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act.

SEC. 2. The Legislature finds and declares the following:

(a) The introduction of exotic plant and animal pests poses a serious threat to the health, safety, and economic well-being of the people of the state.

(b) Imported products provide a host material for exotic pests entering the state and the inspection of host material and the exclusion of exotic plant and animal pests is the most effective and efficient pest management tool available to the state.

(c) The inspection and removal of exotic pests from air and marine conveyances is a necessary and reasonable service provided by the state and its political subdivisions.

SEC. 3. Section 5350 is added to the Food and Agricultural Code, to read:

5350. (a) The director shall establish a program for the inspection of conveyances entering California through airport and maritime facilities to prevent the introduction into, or the spread within, this state of pests.

(b) The director shall maintain plant quarantine inspection stations at points of entry at airports and marine terminals pursuant to Section 5341.

(c) The director shall establish a program for the dissemination of information at airports and marine terminals in order to provide the users of the facilities information regarding the pest control and quarantine requirements of this state.

(d) The director may authorize the inspection and certification of conveyances outside the state if the director finds that the inspection and certification meets the standards established for in-state inspection and certification programs and, for that purpose, may enter into any agreements necessary with any other state or the federal government. The director may provide that conveyances inspected and certified pursuant to this subdivision are not required to be inspected at California airports or marine terminals.

(e) The functions of this section shall be performed by the Division of Plant Industry, Pest Exclusion Branch, of the department, and the duties shall be performed by plant quarantine officers.

SEC. 4. Section 5351 is added to the Food and Agricultural Code, to read:

5351. (a) The director shall levy a service charge, to the extent authorized by subsection (b) of Section 1513 of Title 49 of the United States Code, based on the schedule established pursuant to Section 5353, on each air carrier or foreign air carrier engaged in foreign air commerce, as those terms are defined by Section 5353, for the use of airport facilities for plant and animal pest inspection, quarantine, and eradication.

(b) For the purposes of this section, "airport facilities" means those airports owned or operated by any public entity.

SEC. 5. Section 5352 is added to the Food and Agricultural Code, to read:

5352. To the extent permitted by federal law, the director shall levy a fee on commercial marine carriers, based on the schedule established pursuant to Section 5353, for the use of marine terminal facilities for plant and animal pest inspection, quarantine, and eradication. The director shall identify and establish a list of countries which the director

has reason to believe are potential sources of exotic plant and animal pests.

SEC. 6. Section 5353 is added to the Food and Agricultural Code, to read:

5353. (a) Each air carrier or foreign air carrier engaged in foreign air commerce which carries animals or plants or other materials which are, or are likely to be, infected or infested with any pest shall pay a charge of eighty-five dollars ($85) to the director upon the initial landing in this state of each flight of the carrier which originates outside the United States.

(b) Each commercial marine carrier engaged in foreign commerce which carries animals or plants or other materials which are, or are likely to be, infected or infested with any pest shall pay a fee of two hundred dollars ($200) to the director upon the initial arrival in this state of the carrier on a voyage which originated outside the United States from a country identified and listed by the director pursuant to Section 5352, or which made an intermediate stop on that voyage in a country identified and listed by the director pursuant to Section 5352.

(c) Each such carrier shall maintain records, which shall be subject to inspection by the director, and pay the charges and fees prescribed by this section in accordance with a procedure adopted by the director, by regulation.

(d) Each such carrier who fails to pay the charges and fees required pursuant to this section and the regulations adopted pursuant to this section is subject to a penalty of 2 percent on the amount of the unpaid charge or fee for each month, or portion thereof, that the charges or fees are not paid.

(e) The charges and fees collected pursuant to this section shall be deposited in the Department of Food and

Agriculture Fund and shall be used by the director for the purposes of this section and Section 5350.

(f) The director may, by regulation, increase or decrease any of the charges or fees prescribed in subdivision (a) or (b) upon determining that the revenue received is inadequate or in excess of the amount needed to conduct an effective inspection program. The maximum adjusted charge or fee shall not exceed three times the amount of the charge or fee specified in subdivision (a) or (b).

(g) The director may contract with federal and state agencies and with county agricultural commissioners to assist the director in carrying out the purposes of this section and Section 5350.

(h) The regulations adopted by the director pursuant to this section shall be deemed to relate to rates for purposes of Section 11343 of the Government Code and are not subject to review, approval, or disapproval by the Office of Administrative Law pursuant to Article 6 (commencing with Section 11349) of Chapter 3.5 of Part I of Division 3 of Title 2 of the Government Code.

(i) "Air carrier," "foreign air carrier," and "foreign air commerce", as used in this section, and Section 5351 shall have the same meaning as specified in subsections (3), (22), and (23), respectively, of Section 1301 of Title 49 of the United States Code.

SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this

act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

SEC. 8. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

It is necessary to enact programs that are alternatives to the repeated application of pesticides in order to eradicate pests, including the Mediterranean fruit fly in Los Angeles County. This act would enact one such alternative and, in order to protect the people and the environment from the repeated application of pesticides and to protect California's agriculture from pests as soon as possible, it is necessary that this act take effect immediately.

APPENDIX E

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE REGULATION

In Title 3, Division 4, Chapter 3, Subchapter 4,
adopt Article 6, Section 3560
Article 6. Airport and Marine Terminal Inspection

Section 3560. *Facility Service Charges and User Fees.*

(a) Pursuant to sections 5351 and 5353(a), each air carrier or foreign air carrier shall pay a service charge of eighty-five dollars ($85) to the Director upon the initial landing in California of each flight of the carrier which originated outside the United States from a country to which a current United States Department of Agriculture quarantine or California Department of Food and Agriculture quarantine is applicable, or which made an intermediate stop on that flight in such a country. Any carrier may apply for an exemption from Department inspection and payment of the fee as to particular flights on the basis that the aircraft's operations and other inspections and certifications provide adequate compliance with the objectives of the Act.

(b) Pursuant to sections 5352 and 5353(b), each marine carrier engaged in foreign commerce shall pay a user fee of two hundred dollars ($200) to the Director upon the initial arrival in California of a carrier's vessel on a voyage which originated outside the United States from a country to which a current United States Department of Agriculture quarantine or California Department of Food and Agriculture quarantine is applicable, or which made an intermediate stop on that voyage in such a country. Any carrier may apply for an exemption from Department inspection and payment of the fee as to particular voyages on the basis that the carrier's operations and other inspections and certifica-

tions provide adequate compliance with the objectives of the Act.

(c) Each air and marine carrier subject to the above charges or fees shall file a return quarterly in the form prescribed by the Director, verified by the company officer primarily responsible for supervising the preparation of the return and assuring its accuracy. The return, accompanied by full payment, shall be timely filed so as to be received by the Cashier of the California Department of Food and Agriculture within thirty (30) days following the quarters ending on March 31, June 30, September 30 and December 31. Returns not received by such dates, or received without required information and verification, shall be subject to the penalty prescribed by section 5353, subsection (d).

NOTE: Authority: Sections 407 and 5351 through 5353, Food and Agricultural Code.

Reference: Sections 5350 through 5353, Food and Agricultural Code.

APPENDIX F

FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND RESTITUTION

CASE NO. BC047104

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ALASKA AIRLINES, INC., a corporation; AMERICAN AIRLINES, INC., a corporation; DELTA AIR LINES, INC., a corporation; NORTHWEST AIRLINES, INC., a corporation; and UNITED AIR LINES, INC., a corporation,

Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; HENRY J. VOSS, as Director of the California Department of Food and Agriculture; STATE OF CALIFORNIA; and DOES 1 through 20, inclusive,

Defendants.

ORIGINAL FILED
JUN 17 1992
COUNTY CLERK

Plaintiffs Alaska Airlines, Inc. ("Alaska"), American Airlines, Inc, ("American"), Delta Air Lines, Inc. ("Delta"), Northwest Airlines, Inc. ("Northwest"), and United Air Lines, Inc. ("United") (collectively "plaintiffs"), allege causes of action against defendants California Department of Food and Agriculture ("Department"), Henry J. Voss, as Director of the Department ("Director"), and the State of California ("State") (collectively "defendants"), as follows:

1. Plaintiff Alaska is an Alaska corporation authorized to do and doing business in the State of California. Alaska is an "air carrier" within the meaning of 49 U.S.C. Section 1301(3).

2. Plaintiff American is a Delaware corporation authorized to do and doing business in the State of California. American is an "air carrier" within the meaning of 49 U.S.C. Section 1301(3).

3. Plaintiff Delta is a Delaware corporation authorized to do and doing business in the State of California. Delta is an "air carrier" within the meaning of 49 U.S.C. Section 1301(3).

4. Plaintiff Northwest is a Minnesota corporation authorized to do and doing business in the state of California. Northwest is an "air carrier" within the meaning of 49 U.S.C. Section 1301(3).

5. Plaintiff United is a Delaware corporation authorized to do and doing business in the State of California. United is an "air carrier" within the meaning of 49 U.S.C. Section 1301(3).

6. Defendant Department is a department of the government of the State of California.

7. Defendant Director is, and at all times mentioned in this complaint, was the director of the Department.

8. The true names and capacities, whether individual, corporate associate, or otherwise, of defendants Does 1 through 20, inclusive, are presently unknown to plaintiffs, who therefore sue these defendants by such fictitious names. Plaintiffs are informed and believe and thereon allege that each of the Doe defendants was and is either intentionally, negligently, or in some other manner, the cause or contributing cause of or otherwise responsible for, the damage suffered by plaintiffs or the administration of the statutes and

regulations that are the subject of this complaint. Plaintiffs will amend this complaint to allege the true names and capacities of each Doe defendant, together with such allegations as may be appropriate, when their names have been ascertained.

9. On or about September 30, 1990, the State Legislature enacted, and the Governor approved, Senate Bill No. 2772, the California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act ("the Act"). By this legislation, Sections 5350 through 5353 were added to the California Food and Agricultural Code.

10. Section 4 of the Act added Section 5351 to the California Food and Agricultural Code. That section reads, in pertinent part, as follows:

> "(a). The director shall levy a service charge, to the extent authorized by subsection (b) of Section 1513 of Title 49 of the United States Code, based on the schedule established pursuant to Section 5353, on each air carrier or foreign air carrier engaged in foreign air commerce, as those terms are defined by Section 5353, for the use of airport facilities for plant and animal pest inspection, quarantine and eradication."

11. Effective April 1, 1991, the Director caused the Department to promulgate regulations purportedly intended to implement the provisions of Section 5351(a) of the California Food and Agricultural Code, which regulations required air carriers, including plaintiffs, to pay an $85 inspection fee for each flight landing in California from foreign countries (the "Inspection Fee"). Those regulations, which are set forth in Title 3, Section 3560 of the California Code of Regulations (the "Regulations"), state in pertinent part:

> "(a) Pursuant to Sections 5351 and 5353(a) [of the Food and Agricultural Code], each air carrier or for-

eign air carrier shall pay a service charge of eighty-five dollars ($85) to the Director upon the initial landing in California of each flight of the carrier which originated outside the United States from a country to which a current United States Department of Agriculture quarantine or California Department of Food and Agriculture quarantine is applicable, or which made an intermediate stop on that flight in such a country."

12. The Regulations are invalid and unenforceable for at least the following reasons:

(a) Food and Agricultural Code Section 5351(a) permits the imposition of a service charge only to the extent such a service charge is authorized by 49 U.S.C. Section 1513(b). The Inspection Fee required by the Regulations is not authorized by 49 U.S.C. Section 1513(b);

(b) The Inspection Fee and the Regulations conflict with, and are impermissible under, the provisions of 49 U.S.C. Section 1513(a).

13. The Act is invalid and unenforceable because the State is preempted from enacting any legislation with respect to the inspection for pests accompanying aircraft, passengers, baggage and cargo arriving from foreign countries at international airport facilities in California in that (a) Congress has manifested its intent to occupy the field by virtue of its comprehensive regulation of that subject matter, or (b) implementation of the Act would impede the purposes and objectives of Congress.

14. Plaintiffs are informed and believe and thereon allege that defendants have not implemented the Act in accordance with its terms or in a manner permitted under California or federal law, in that, among other things, (a) the Director has not established a program for the inspection of conveyances entering California through airport facilities to prevent the introduction into, or the spread

within, the State of pests, (b) the Director has not maintained plant quarantine inspection stations at points of entry at airports, (c) the duties to be performed pursuant to the Act have not been performed by plant quarantine officers of the Division of Plant Industry, pest Exclusion Branch, of the Department, and (d) the United States Department of Agriculture is not permitted to receive from the defendants funds in excess of its Congressional appropriation for agricultural pest inspection.

15. Commencing on or about August 12, 1991, and continuing thereafter United demanded that defendants rescind the Regulations and refund the Inspection Fees that United had paid under protest. Defendants have failed and refused to comply with this demand.

FIRST CAUSE OF ACTION
(For Declaratory Relief by All Plaintiffs Against All Defendants)

16. Plaintiffs reallege and incorporate by reference paragraphs 1 through 12 and 15, set forth above.

17. An actual controversy now exists between plaintiffs and defendants. Plaintiffs contend that the Regulations are invalid and unenforceable because the Inspection Fee and the Regulations are not authorized by Food and Agricultural Code Section 5351(a) and 49 U.S.C. Section 1513(b), while defendants contend otherwise.

18. Plaintiffs desire a judicial determination of their respective rights and duties with respect to the Regulations. In particular, plaintiffs desire a declaration that the Inspection Fee and the Regulations are not authorized by Food and Agricultural Code Section 5351(a) and 49 U.S.C. Section 1513(b).

19. The requested declaratory relief is necessary and appropriate at this time to enable plaintiffs and defendants

to ascertain whether the Regulations are valid and enforceable and whether plaintiffs will be required to continue to pay the Inspection Fees levied upon them by defendants pursuant to the Regulations.

SECOND CAUSE OF ACTION
(For Declaratory Relief By All Plaintiffs Against All Defendants)

20. Plaintiffs reallege and incorporate by reference paragraphs 1 through 12 and 15, set forth above.

21. An actual controversy now exists between plaintiffs and defendants. Plaintiffs contend that the Regulations are invalid and unenforceable because the Inspection Fee and the Regulations violate and conflict with 49 U.S.C. Section 1513(a), while defendants contend otherwise.

22. Plaintiffs desire a judicial determination of their respective rights and duties with respect to the Regulations. In particular, plaintiffs desire a declaration that the Inspection Fee and the Regulations violate and conflict with 49 U.S.C. Section 1513(a).

23. The requested declaratory relief is necessary and appropriate at this time to enable plaintiffs and defendants to ascertain whether the Regulations are valid and enforceable and whether plaintiffs will be required to continue to pay the Inspection Fees levied upon them by defendants pursuant to the Regulations.

THIRD CAUSE OF ACTION
(For Declaratory Relief By All Plaintiffs Against All Defendants)

24. Plaintiffs reallege and incorporate by reference paragraphs 1 through 11, 13 and 15, set forth above.

25. An actual controversy now exists between plaintiffs and defendants. Plaintiffs contend that the Act, and the Regulations promulgated thereunder, are invalid and unenforceable because the State is preempted from enacting any legislation with respect to the inspection for pests accompanying aircraft, passengers, baggage and cargo arriving from foreign countries at international airport facilities, while defendants contend otherwise.

26. Plaintiffs desire a judicial determination of their respective rights and duties with respect to the Act and the Regulations promulgated thereunder. In particular, plaintiffs desire a declaration that the Act, and the Regulations promulgated thereunder, are invalid and unenforceable because the State is preempted from enacting any legislation with respect to the inspection for pests accompanying aircraft passengers baggage and cargo arriving from foreign countries at international airport facilities.

27. The requested declaratory relief is necessary and appropriate at this time to enable plaintiffs and defendants to ascertain whether the Act, and the Regulations promulgated thereunder, are valid and enforceable and whether plaintiffs will be required to continue to pay the Inspection Fees levied upon them by defendants pursuant to the Act and the Regulations.

FOURTH CAUSE OF ACTION
(For Declaratory Relief By All Plaintiffs Against All Defendants)

28. Plaintiffs reallege and incorporate by reference paragraphs 1 through 11, 14 and 15, set forth above.

29. An actual controversy now exists between plaintiffs and defendants. Plaintiffs contend that the Inspection Fees levied upon them by defendants purportedly pursuant to the Regulations and the Act are improper and unenforceable

because defendants have not implemented the Act in accordance with its terms or in a manner permitted under California or federal law, while defendants contend otherwise.

30. Plaintiffs desire a judicial determination of their respective rights and duties with respect to their obligation to pay the Inspection Fees levied upon them by defendants purportedly pursuant to the Act and the Regulations. In particular, plaintiffs desire a declaration that the Inspection Fees levied upon them purportedly pursuant to the Act and the Regulations are improper and unenforceable because defendants have not implemented the Act in accordance with its terms or in a manner permitted under California or federal law.

31. The requested declaratory relief is necessary and appropriate at this time to enable plaintiffs and defendants to ascertain whether the Inspection Fees levied upon plaintiffs by defendants purportedly pursuant to the Regulations and the Act are valid and enforceable and whether plaintiffs will be required to pay the Inspection Fees levied upon them by defendants.

FIFTH CAUSE OF ACTION
(For Injunctive Relief By All Plaintiffs Against All Defendants)

32. Plaintiffs reallege and incorporate by reference paragraphs 1 through 15, set forth above.

33. Unless restrained by this Court, defendants will continue to enforce the Act and the Regulations against plaintiffs. Plaintiffs have no adequate remedy at law in that unless injunctive relief is granted, they will be required to file a multiplicity of actions each time they are compelled to render a quarterly accounting for the Inspection Fees pursuant to the provisions of the Act and the Regulations.

Therefore, plaintiffs are entitled to an injunction prohibiting the enforcement of the Act and the Regulations and the levying of any Inspection Fees upon them by defendants purportedly pursuant to the Act and the Regulations.

SIXTH CAUSE OF ACTION
(For Restitution By Plaintiffs Against All Defendants)

34. Plaintiffs reallege and incorporate by reference paragraphs 1 through 15, set forth above.

35. Pursuant to the Regulations, Alaska has paid Inspection Fees to defendants in the aggregate amount of $279,650 through March 31, 1992. These payments were made pursuant to the provisions of the invalid and unenforceable Act and Regulations and were made by Alaska expressly under protest.

36. On or about December 19, 1991, Alaska submitted a claim to the State to recover the Inspection Fees it paid pursuant to the invalid and unenforceable Act and Regulations. Defendants have either rejected that claim or failed to respond to it.

37. Pursuant to the Regulations, American has paid Inspection Fees to defendants in the aggregate amount of $145,845 through March 31, 1992. These payments were made pursuant to the provisions of the invalid and unenforceable Act and Regulations and were made by American expressly under protest.

38. On or about December 20, 1991, American submitted a claim to the State to recover the Inspection Fees it paid pursuant to the invalid and unenforceable Act and Regulations. Defendants have either rejected that claim or failed to respond to it.

39. Pursuant to the Regulations, Delta has paid Inspection Fees to defendants in the aggregate amount of $290,105

through March 31, 1992. These payments were made pursuant to the provisions of the invalid and unenforceable Act and Regulations and were made by Delta expressly under protest.

40. On or about March 19, 1991, Delta submitted a claim to the State to recover the Inspection Fees it paid pursuant to the invalid and unenforceable Act and Regulations. Defendants have either rejected that claim or failed to respond to it.

41. Pursuant to the Regulations, Northwest has paid Inspection Fees to defendants in the aggregate amount of $134,980 through March 31, 1992. These payments were made pursuant to the provisions of the invalid and unenforceable Act and Regulations and were made by Northwest expressly under protest.

42. On or about January 7, 1992, Northwest submitted a claim to the State to recover the Inspection Fees it paid pursuant to the invalid and unenforceable Act and Regulations. Defendants have either rejected that claim or failed to respond to it.

43. Pursuant to the Regulations, United has paid Inspection Fees to defendants in the aggregate amount of $365,840 through March 31, 1992. These payments were made pursuant to the provisions of the invalid and unenforceable Act and Regulations and were made by United expressly under protest.

44. On or about October 10, 1991, United submitted a claim to the State to recover the Inspection Fees it paid pursuant to the invalid and unenforceable Act and Regulations. Defendants have either rejected that claim or failed to respond to it.

45. Defendants had no right or authority to collect any Inspection Fees from plaintiffs pursuant to the invalid and unenforceable Act and Regulations.

46. Plaintiffs are each entitled to a refund or reimbursement of all Inspection Fees paid or to be paid by each of them pursuant to the invalid and unenforceable Act and Regulations, plus interest thereon.

WHEREFORE, plaintiffs each pray for judgment against defendants as follows:

1. On the First Cause of Action, for a declaration by this Court that the Inspection Fee and the Regulations are not authorized by Food and Agricultural Code Section 5351(a) and 49 U.S.C. Section 1513(b);

2. On the Second Cause of Action, for a declaration by this Court that the Inspection Fee and the Regulations violate and conflict with 49 U.S.C. Section 1513(a);

3. On the Third Cause of Action, for a declaration by this Court that the Act, and the Regulations promulgated thereunder, are invalid and unenforceable because the State is preempted from enacting any legislation with respect to the inspection for pests accompanying aircraft, passengers, baggage and cargo arriving from foreign countries at international airport facilities;

4. On the Fourth Cause of Action, for a declaration by this Court that the Inspection Fees levied upon plaintiffs by defendants purportedly pursuant to the Act and the Regulations are improper and unenforceable because defendants have not implemented the Act in accordance with its terms or in a manner permitted under California or federal law;

5. On the Fifth Cause of Action, for an injunction, both preliminarily during the pendency of these proceedings, and permanently thereafter, enjoining defendants, and each of them, from levying upon plaintiffs or collecting any Inspection Fees pursuant to the Act or Regulations or in any other manner enforcing the Act or the Regulations;

6. On the Sixth Cause of Action, for restitution or reimbursement of all Inspection Fees paid or to be paid by each of the plaintiffs pursuant to the Regulations, plus interest thereon;

7. On all causes of action, for costs of suit, and attorneys fees where permitted by law, and for general relief.

ALSCHULER, GROSSMAN & PINES
BURT PINES
JOHN A. SCHWIMMER

By:
John A. Schwimmer
Attorneys for Plaintiffs

APPENDIX G

ORDER GRANTING MOTION FOR SUMMARY ADJUDICATION OF ISSUES AND FOR SUMMARY JUDGMENT

ORIGINAL FILED JULY 9, 1993

CASE NO. BC047104

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ALASKA AIRLINES, INC., a corporation; AMERICAN AIRLINES, INC., a corporation; DELTA AIR LINES, INC., a corporation; NORTHWEST AIRLINES, INC., a corporation; and UNITED AIR LINES, INC., a corporation,
Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; HENRY J. VOSS, as Director of the California Department of Food and Agriculture; STATE OF CALIFORNIA; and DOES 1 through 20, inclusive,
Defendants.

The motions of plaintiffs Alaska Airlines, Inc., ("Alaska"), American Airlines, Inc. ("American"), Delta Air Lines, Inc. ("Delta"), Northwest Airlines, Inc. ("Northwest"), and United Air Lines, Inc. ("United") for summary adjudication of issues and for summary judgment came on regularly for hearing before this Court on March 8, 1993 at 8:30 a.m. in Department 82, the Honorable Frederick J. Lower, Jr., Judge Presiding. Burt Pines and John Schwimmer of Alschuler, Grossman & Pines appeared as attorneys for plaintiffs, and Deputy Attorney General Charles W. Getz, IV, appeared as attorney for defendants.

The motions were fully briefed and argued by the parties. The Court thereafter took the matter under submission. The Court has given full consideration to all papers submitted by the parties in support of and in opposition to the motions, counsel's oral argument, and all admissible, relevant, and competent evidence. Being fully advised, the Court grants plaintiffs' motions for summary adjudication and finds, declares and orders as follows:

Issue No. 1: There is no defense to plaintiffs' first cause of action against defendants. As shown by plaintiffs in their moving and reply papers, there are no triable issues of material fact relating to the first cause of action. The Director of the California Department of Food and Agriculture ("Director") was granted the power to collect the fee at issue ("Fee" or "Fees" herein) under California Food and Agricultural Code, Section 5351(a), but only to the extent authorized by 49 U.S.C. Section 1513(b). There are no triable issues of material fact regarding the following: the Fee collected by defendants is not a tax described in Section 1513(b); neither the State of California nor any of the other defendants owns or operates any of the airports at which the Fee is charged to plaintiffs; the Fee is not imposed for the use of airport facilities or for the present operation and maintenance of existing airport facilities. Consequently, plaintiffs are entitled to a declaration that the Fee is not authorized by 49 U.S.C. Section 1513(b).

A. The following evidence supports this determination: California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act ("Act") (plaintiffs' Exh. 1); California Food and Agricultural Code Sections 5350(a), 5351(a), 5352, and 5353(b); Certificates issued by the California Department of Transportation (plaintiffs' Exh. 5); Federal Permits (plaintiffs' Exh. 6); Cooperation Agreement (plaintiffs' Exh. 3); March 18, 1991 letter from Martina Heleamau to Rod D. Margo (plaintiffs' Exh. 9);

Regulations of the Department of Food and Agriculture, Title 3, Section 3560 of the California Code of Regulations (plaintiffs' Exh. 2) ("Regulations"); defendants' Supplemental Interrogatory Responses No. 1, (plaintiffs' Exh. 4, p. 3).

B. For the reasons stated in plaintiffs' moving and reply papers, the evidence proffered by defendants does not create a triable issue of material fact. Among other things:

1. Defendants agree that the Director is permitted to levy Fees upon air carriers under California Food and Agricultural Code Section 5351(a) only to the extent such Fees are authorized by 49 U.S.C. Section 1513. (Defendants' Separate Statement, ¶1.)

2. Defendants concede that they do not own or operate the airports at which the Fees are charged. (Defendants' Separate Statement, ¶2.). The facts stated in plaintiffs' Exhibits 5 and 6 are uncontroverted.

3. Defendants have failed to submit any evidence to create a disputed issue of fact as to whether the Fees are for the use of airport facilities. In their Separate Statement (No. 3), defendants refer to the recitals of legislative purpose contained in Section 2 of the Act and Sections 5350(a), 5351(a), 5352, and 5353(b) of the California Food and Agricultural Code. None of these provisions constitutes evidence or creates a reasonable inference that the Fees are for the use of airport facilities. On the contrary, the evidence and reasonable inferences from these provisions reveal that the purpose of the Fees is to generate revenue to fund inspections to prevent pest infestation and thereby protect agricultural interests and the general public. Defendants also cite Paragraph 7 of the Declaration of Valerie Brown and Paragraph 8 of the Declaration of James Reynolds. Neither paragraph contains any admissible evidence on point or provides any reasonable inference that the

Fees are collected "for the use of airport facilities" within the meaning of Section 1513(b). The fact that the inspections occur on airport premises does not make the Fee a fee or charge for the use of airport facilities.

4. Defendants have offered no evidence that the subject Fee is a "tax" rather than a "fee." To the contrary, the sections of the Food and Agricultural Code and Regulations referred to in defendants' Separate Statement (No. 4) describe the Fee as a "service charge," not a "tax." In defendants' supplemental responses to plaintiffs' interrogatories, defendant Department of Food and Agriculture "asserts that the inspection Fee is a service charge ...." (Plaintiffs' Exh. 4, page 3.)

Issue No. 2: There is no defense to plaintiffs' second cause of action against defendants. For the reasons stated in plaintiffs moving and reply papers, there are no triable issues of material fact relating to the second cause of action. Among other things, the Fees charged are passed on to air passengers by the plaintiffs. The Fee constitutes a fee or charge on the carriage of persons travelling in air commerce and an indirect fee or charge on persons travelling in air commerce. Therefore, plaintiffs are entitled to a declaration that the Fees are impermissible under 49 U.S.C. Section 1513(a).

A. The following evidence supports this determination: The Act (plaintiffs' Exh. 1); Regulations (plaintiffs' Exh. 2); Vingo Decl., ¶4; Short Decl., ¶4; Gersmehl Decl., ¶4; Haan Decl., ¶4; Lilly Decl., ¶4; Enrolled Bill Report, dated December 12, 1990 (plaintiffs' Exh. 10).

B. For the reasons stated in plaintiffs' moving and reply papers, the evidence proffered by defendants does not create any triable issue of material fact. Among other things:

1. Defendants have not produced any evidence contradicting plaintiffs' evidence that the Fees are passed on to

plaintiffs passengers. According to the Enrolled Bill Report (plaintiffs' Exh. 10), defendants expected that the Fees would be passed on to airline passengers.

2. Defendants have proffered certain evidence contained in the declarations of Valerie Brown and James Reynolds (defendants' Separate Statement Nos. 7-11). None of this evidence creates a triable issue of material fact as to whether 49 U.S.C. Section 1513(a) has been violated. A key test for determining whether a fee or charge is impermissible under Section 1513(a) is whether the Fee is ultimately passed on to air passengers. The only evidence in the record reflects that the plaintiffs have passed the Fees on to their passengers. It is immaterial that the Fees are imposed on airlines based on criteria other than the number of passengers; that the Fees are also imposed on non-passenger flights; that the Fees do not vary depending upon the number of passengers or passenger receipts; that inspections are also performed on air cargo and air freight operations; and that the amount of the Fee is subject to change or elimination by the Director under an incentive program in which the airlines may participate or pursuant to a request for exemption. See *City & County of Denver v. Continental Airlines, Inc.*, 712 F. Supp. 834 (D. Col. 1989), and *Rocky Mountain Airways, Inc. v. Pitkin County,* 684 F. Supp. 312 (D. Col. 1987).

Issue No. 3 : There is no defense to plaintiffs' sixth cause of action against defendants. As shown by plaintiffs in their moving and reply papers, there are no triable issues of material fact relating to the sixth cause of action. For the reasons stated above, the Fees are not authorized by 49 U.S.C. Section 1513(b) and they are impermissible under 49 U.S.C. Section 1513(a). Through September 30, 1992, plaintiffs have paid total inspection Fees to the defendants Department of Food and Agriculture ("Department") and State of California in the following amounts: Alaska - $449,650; American - $229,998; Delta - $443,190; North-

west - $205,020; and United - $671,755. All of these payments were made pursuant to the Regulations and were made expressly under protest. Plaintiffs paid these Fees with respect to international flights of plaintiffs landing at airports in Los Angeles, San Francisco, San Diego, and/or San Jose.

Plaintiffs have filed timely claims with the California State Board of Control ("Board"). On or about December 19, 1991, Alaska filed with the Board a claim demanding refund of $115,600 plus all future payments made by Alaska pursuant to the Regulations, plus interest on all such payments. On or about December 20, 1991, American filed with the Board a claim demanding refund of $64,755 plus all future payments made by American pursuant to the Regulations, plus interest on all such payments. On or about March 19, 1992, Delta filed with the Board a claim demanding refund of $217,515 plus all future payments made by Delta pursuant to the Regulations, plus interest on all such payments. On or about January 7, 1992, Northwest filed with the Board a claim demanding refund of $64,005 plus all future payments made by Northwest pursuant to the Regulations, plus interest on all such payments. On or about October 10, 1991, United filed with the Board a claim demanding refund of $80,920 plus all future payments made by United pursuant to the Regulations, plus interest on all such payments. As additional payments were thereafter made by each of the plaintiffs, the aforesaid claims were supplemented by letters to the Board from plaintiffs. The Board has not accepted the claims. Plaintiffs are each entitled to reimbursement of all Fees paid by them and hereafter paid by them pursuant to the Regulations, plus interest thereon.

A. The following evidence supports this determination: Vingo Decl., ¶¶ 2, 3; Short Decl., ¶¶ 2, 3; Donohue Decl., ¶ 3; Gersmehl Decl., ¶¶ 2, 3; Haan Decl., ¶¶ 2, 3; Lilly Decl., ¶¶ 2, 3.

B. For the reasons stated in plaintiffs' moving and reply papers, the evidence proffered by defendants does not create a triable issue of material fact. Among other things:

1. Defendants have not submitted any evidence to create any triable issue of material fact with respect to the amount of Fees which plaintiffs paid through September 30, 1992. Plaintiffs' evidence on this subject is uncontradicted. Although the declaration of Valerie Brown (¶ 14) raised an inference that there might be an approximate $6,000 discrepancy with respect to the Fees which American claimed to have paid through June 30, 1992, defendants produced no evidence that American's numbers as of September 30, 1992 were erroneous.

2. Defendants have not submitted any competent or admissible evidence to create any triable issue of material fact with respect to plaintiffs' compliance with the Tort Claims Act (assuming such compliance is necessary). The only admissible and competent evidence before the Court reflects unequivocally that each plaintiff filed a claim within one year after its first payment of the Fees. The copy of the claim on behalf of American which is attached to the Valerie Brown declaration reflects that the claim was filed on December 27, 1991, a date consistent with plaintiffs' evidence and within the allowable statutory period. No triable issue of material fact is raised by reason of the Board's June 18, 1992 letter, a copy of which is attached to the Valerie Brown declaration. That letter refers to American's supplemental claim, not American's original claim. The letter also incorrectly states that the claim period is six months instead of one year. Plaintiffs are not required to file separate claims for each quarterly payment of Fees and are entitled to supplement their original claim for each payment of Fees.

Issue Nos. 4 and 5: There is no merit to defendants' first affirmative defense based on the statute of limitations and

laches as to any cause of action. As shown by plaintiffs in their moving and reply papers, there are no triable issues of material fact relating to this affirmative defense. The Act was signed into law by the Governor on September 30, 1990. The Regulations were promulgated by the Director, effective April 1, 1991. Under the Regulations, plaintiffs were required to make the first quarterly payment of Fees on or before July 30, 1991. On August 12, 1991, one of the plaintiffs, United, wrote the Director and, in an effort to avoid litigation, outlined its position as to why the Fees were invalid. After an extended dialogue, the defendants determined that they would not rescind the Regulations or the Fees. Plaintiffs then filed this lawsuit on January 24, 1992. The lawsuit was timely filed. Defendants have not met their burden of producing evidence under Code of Civil Procedure Section 437c(n). Defendants have not identified any conduct that purportedly constitutes laches and have not identified any possible prejudice that would give rise to an affirmative defense of laches.

A. The following evidence supports this determination: The Act (plaintiffs' Exh. 1); the Regulations (plaintiffs' Exh. 2); the August 12, 1991 letter from counsel for United to the Director (plaintiffs' Exh. 11); Schwimmer Decl. ¶ 13.

B. The only evidence proffered by defendants in support of their first affirmative defense is Exhibit A to the Declaration of Valerie Brown. This evidence is apparently proffered in support of defendants assertion that "at least one, and possibly other claims under the Tort Claims Act were not filed in a timely fashion and was [sic] rejected by the Board of Control of the State of California on that basis." (Defendants' Separate Statement No. 28.) As stated above, with respect to Issue No. 3, plaintiffs' claims were timely filed under the Tort Claims Act. No triable issue of material fact is raised by reason of Exhibit A to the Valerie Brown Declaration.

Issue No. 6: There is no merit to defendants' second affirmative defense of unclean hands as to any cause of action. As shown by plaintiffs in their moving and reply papers, there are no triable issues of material fact relating to this affirmative defense. Defendants have not met their burden of producing evidence under Code of Civil Procedure 437c(n) and have not produced any evidence showing that plaintiffs have "unclean hands." On the contrary, the court finds that plaintiffs have acted wholly in good faith. They have communicated their position to defendants, attempted to achieve a non-judicial resolution of the issues between the parties, paid the Fees under protest notwithstanding their belief that the Fees are invalid and unenforceable, and asserted these claims in the appropriate judicial forum.

A. The following evidence supports this determination: August 12, 1991 letter from counsel for United to the Director (plaintiffs' Exh. 11); Vingo Decl., ¶ 2; Short decl., ¶ 2; Donohue Decl., ¶ 2; Gersmehl Decl., ¶ 2; Haan Decl., ¶ 2; Lilly Decl., ¶ 2.

B. The only evidence proffered by the defendants is the Declaration of Valerie Brown, paragraphs 7 and 14. No triable issue of fact is created. Among other things, the statements in paragraph 7 do not reveal any unclean hands or improper conduct on the part of the plaintiffs with respect to the first, second, fifth or sixth causes of action. Similarly, paragraph 14 does not contain evidence of unclean hands on the part of the plaintiffs.

Issue No. 7: There is no merit to defendants' third affirmative defense of "good faith" as to any cause of action. For the reasons stated by plaintiffs in their moving and reply papers, there are no triable issues of material fact relating to this affirmative defense. The defendants' good faith is not an issue in the lawsuit and the affirmative defenses are defective and inapplicable as a matter of law.

Issue No. 8: Defendants have withdrawn their fourth affirmative defense concerning "political issues."

Issue No. 9: There is no merit to defendants' fifth affirmative defense that the issues raised by this action are being addressed by the Legislature as to any cause of action. As shown by plaintiffs in their moving and reply papers, there are no triable issues of material fact relating to this affirmative defense. The defense is defective and inapplicable as a matter of law. According to defendants' Separate Statement (No. 36), this affirmative defense has also been withdrawn.

Issue No. 10: There is no merit to defendants' sixth affirmative defense of failure to exhaust administrative remedies as to any cause of action. As shown by plaintiffs in their moving and reply papers, there are no triable issues of material fact relating to the sixth affirmative defense. There is no specific administrative remedy available to plaintiffs to challenge the Act or the Regulations. Even if the plaintiffs were obligated to pursue any administrative remedies, the August 12, 1991 letter to the Director from counsel for United fulfills any such requirement.

A. The following evidence supports this determination: The Act (plaintiffs' Exh. 1); the Regulations (plaintiffs' Exh. 2); August 12, 1991 letter from counsel to United Airlines (plaintiffs' Exh. 11).

B. Defendants admit that there is no administrative mechanism available to challenge the imposition of the inspection Fees (defendants' Separate Statement No. 37). The only evidence proffered by defendants on this issue is Exhibit A to the declaration of Valerie Brown relating to compliance with the Tort Claims Act. As stated above, with respect to Issue Nos. 3, 4 and 5, plaintiffs' claims were timely filed under the Tort Claims Act. No triable issue of material fact is raised by reason of Exh. A to the Valerie

Brown declaration. Defendants have not met their burden of proof with respect to this affirmative defense.

Issue No. 11: There is no merit to defendants' seventh affirmative defense of misjoinder or nonjoinder of parties as to any cause of action. As shown by plaintiffs in their moving and reply papers, there are no triable issues of material fact relating to the seventh affirmative defense. This purported affirmative defense is defective and inapplicable as a matter of law. In their Separate Statement (No. 40), defendants have suggested, without evidentiary support, that the United States Department of Agriculture ("USDA") should be a party. The USDA is not a necessary party because this court can afford complete relief to plaintiffs with respect to the Act, Regulations and Fees without rendering any judgment with respect to the USDA. Furthermore, the defendants' claim of misjoinder or nonjoinder would apply, if at all, only to the plaintiffs' fourth cause of action. That cause of action is not an issue in the instant motion. Defendants have not met their burden of proof with respect to this affirmative defense.

Issue No. 12: Alaska is entitled to reimbursement from defendants in the amount of $449,650, as alleged in the sixth cause of action. For the reasons stated in this order and in plaintiffs' moving and reply papers, there are no triable issues of material fact relating to this issue. Defendants' objection (defendants' Separate Statement No. 41) with respect to compliance with the Tort Claims Act is addressed above.

Issue No. 13: American is entitled to reimbursement from defendants in the amount of $229,998, as alleged in the sixth cause of action. For the reasons stated in this order and plaintiffs' moving and reply papers, there are no triable issues of material fact relating to this issue. Defendants' objection (defendants' Separate Statement No. 42) with

respect to the $6,000 discrepancy as of June 30, 1992 is addressed above.

Issue No. 14: Delta is entitled to reimbursement from defendants in the amount of $443,190, as alleged in the sixth cause of action. For the reasons stated in this order and in plaintiffs' moving and reply papers, there are no triable issues of material fact relating to this issue. Defendants' objection (defendants' Separate Statement No. 43) with respect to compliance with the Tort Claims Act is addressed above.

Issue No. 15: Northwest is entitled to reimbursement from defendants in the amount of $205,020, as alleged in the sixth cause of action. For the reasons stated in this order and in plaintiffs moving and reply papers, there are no triable issues of material fact relating to this issue. Defendants' objection (defendants' Separate Statement No. 44) with respect to compliance with the Tort Claims Act is addressed above.

Issue No. 16: United is entitled to reimbursement from defendants in the amount of $671,755, as alleged in the sixth cause of action. For the reasons stated in this order and in plaintiffs' moving and reply papers, there are no triable issues of material fact relating to this issue. Defendants, objection (defendants' Separate Statement No. 45) with respect to compliance with the Tort Claims Act is addressed above.

IT IS FURTHER ORDERED that, summary adjudication having been granted as to issues 1 and 2, and 4 through 16, plaintiffs' request to dismiss without prejudice their third and fourth causes of action is granted.

IT IS FURTHER ORDERED that, summary adjudication having been granted as to issues 1 through 16, the defendants' cross-complaint against Northwest is dismissed with prejudice.

IT IS FURTHER ORDERED that, summary adjudication having been granted as to issues 1 through 16, the plaintiffs' motion for summary judgment is granted.

IT IS FURTHER ORDERED that defendants are permanently enjoined from collecting any fees or charges from plaintiffs under California Food and Agricultural Code Sections 5350-5353 or under the Regulations.

IT IS FURTHER ORDERED that plaintiffs are entitled to reimbursement from defendant State of California of all fees and charges paid by them through September 30, 1993, as set forth above, plus all additional fees and charges paid by them to the date of judgment in this matter. If the parties are unable to arrive at this amount by stipulation, plaintiff shall be entitled to produce evidence of such payments by motion prior to entry of judgment.

IT IS FURTHER ORDERED that plaintiffs are entitled to pre- and post-judgment interest at the legal rate.

IT IS FURTHER ORDERED that plaintiffs are entitled to their costs of suit.

IT IS FURTHER ORDERED THAT judgment shall be entered in favor of plaintiffs and against defendants in accordance with the terms of this Order.

DATED: JULY 09, 1993

/S/

Frederick J. Lower, Jr.
Superior Court Judge

APPENDIX H

JUDGMENT BY COURT UNDER C.C.P. § 437(c)

Department 82

CASE NO. BC047104

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ALASKA AIRLINES, INC., a corporation;
AMERICAN AIRLINES, INC., a corporation;
DELTA AIR LINES, INC., a corporation;
NORTHWEST AIRLINES, INC., a corporation;
and UNITED AIR LINES, INC., a corporation,

Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE;
HENRY J. VOSS, as Director of the California Department
of Food and Agriculture; STATE OF CALIFORNIA; and
DOES 1 through 20, inclusive,

Defendants.

ORIGINAL FILED JULY 9, 1993

The Court, having on June 1, 1993 granted plaintiffs' motions for summary adjudication of issues and for summary judgment and having ordered entry of judgment as requested in said motions, and the parties having stipulated to the additional fees and charges paid by plaintiffs to the date of this judgment and the accrued prejudgment interest,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Defendants California Department of Food and Agriculture, Henry J. Voss, and State of California, and each of them, are hereby permanently enjoined from collecting from

plaintiffs any fees or charges under Food and Agricultural Code Sections 5350-5353 or pursuant to the regulations of defendant Department of Food and Agriculture contained in Title 3, Section 3560 of the California Code of Regulations.

2. Plaintiff Alaska Airlines, Inc. shall recover from defendant State of California all fees and charges paid under California Food and Agricultural Code Sections 5350-5353 in the amount of $588,625, plus prejudgment interest thereon in the amount of $43,060.64 for a total judgment of $631,685.64.

3. Plaintiff American Airlines, Inc. shall recover from defendant State of California all fees and charges paid under California Food and Agricultural Code Sections 5350-5353 in the amount of $296,395, plus prejudgment interest thereon in the amount of $21,460.40 for a total judgment of $317,855.40.

4. Plaintiff Delta Air Lines, Inc. shall recover from defendant State of California all fees and charges paid under California Food and Agricultural Code Sections 5350-5353 in the amount of $601,035, plus prejudgment interest thereon in the amount of $43,204 for a total judgment of $644,239.00.

5. Plaintiff Northwest Airlines, Inc. shall recover from defendant State of California all fees and charges paid under California Food and Agricultural Code Sections 5350-5353 in the amount of $259,250, plus prejudgment interest thereon in the amount of $18,723.04 for a total judgment of $277,973.04.

6. Plaintiff United Air Lines, Inc. shall recover from defendant State of California all fees and charges paid under California Food and Agricultural Code Sections 5350-5353 in the amount of $1,015,155, plus prejudgment interest thereon in the amount of $63,666.52 for a total judgment of $1,078,821.52.

7. Plaintiffs shall recover from defendant State of California its costs of suit in the amount of $520.00.

8. This Court shall have continuing jurisdiction to enter appropriate orders for such other and further post-judgment relief as may be necessary or appropriate.

9. The provisions of this judgment shall be stayed until July 30, 1993.

DATED: July 9, 1993

/s/

Fredrick J. Lower, Jr.
Judge of the Superior Court

(3)

Supreme Court, U.S.
FILED
OCT 20 1995
CLERK

No. 95-488

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ALASKA AIRLINES, INC., AMERICAN AIRLINES, INC.
DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC.
and UNITED AIR LINES, INC.
Petitioners,

v.

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE,
HENRY J. VOSS, as Director of the California
Department of Food and Agriculture,
and STATE OF CALIFORNIA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
(Counsel of Record)
CHARLES W. GETZ, IV
Assistant Attorney General
JOHN DAVIDSON
Supervising Deputy Attorney General
MARC N. MELNICK
Deputy Attorney General
50 Fremont Street, Suite 300
San Francisco, CA 94105
Telephone: (415) 356-6348
Counsel for Respondents

24 pp

QUESTIONS PRESENTED FOR REVIEW

Is California's agricultural pest inspection fee, imposed on certain airline flights originating outside the United States, prohibited by the Anti-Head Tax Act, as codified at 49 U.S.C. section 40116b(b) (formerly 49 U.S.C. section 1513)?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 24.2, respondents accept petitioners' statement in their Petition for a Writ of Certiorari.

TABLE OF CONTENTS

		Page
QUESTIONS PRESENTED FOR REVIEW		i
PARTIES TO THE PROCEEDINGS		ii
OPINION OR JUDGMENT BELOW		1
STATEMENT OF JURISDICTION		1
STATUTORY PROVISIONS		2
STATEMENT OF THE CASE		2
SUMMARY OF ARGUMENT		4
ARGUMENT		5
I.	THE CALIFORNIA COURT OF APPEAL CORRECTLY DECIDED THAT THE FEDERAL ANTI-HEAD TAX ACT DOES NOT PROHIBIT CALIFORNIA FROM IMPOSING THIS AGRICULTURAL INSPECTION FEE	7
II.	THE CALIFORNIA COURT OF APPEAL'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS.	12
III.	THE RECORD IN THIS CASE IS NOT SUFFICIENT TO AFFORD THIS COURT COMPLETE REVIEW OF THE QUESTIONS PRESENTED.	15

CONCLUSION 17

TABLE OF AUTHORITIES

	Page
Cases	
Air Transport Ass'n of Am. v. City of Los Angeles, 844 F.Supp 550, 552-55 (C.D. Cal. 1994)	16
Alamo Rent-a-Car, Inc. v. City of Palm Springs, 955 F.2d 30, 31 n.1 (9th Cir. 1991)	11
Alaska Airlines, Inc. v. Department of Food & Agric., 33 Cal.App.4th 506 (1995)	5, 9, 15
Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7, 12 n.6, 13 (1983)	9, 12, 13
City and County of Denver v. Continental Air Lines, Inc., 712 F.Supp. 834, 838-39 (D. Colo. 1989)	11
Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972)	7
Island Aviation, Inc. v. Guam Airport Auth., 562 F.Supp. 951, 957-59 (D. Guam 1982)	11

New England Legal Foundation v.
Mass. Port Authority,
883 F.2d 187 (1st Cir., 1989) 14, 16

Northwest Airlines, Inc. v.
County of Kent, Michigan,
510 U.S. ____, 114 S.Ct. 855 (1994) 12, 13

Travel Services, Inc. v.
Government of the Virgin Islands,
904 F.2d 186, 188-89 (3rd Cir. 1990),
cert. denied, 498 U.S. 939 11

Wardair Canada, Inc. v.
Florida Dep't of Revenue,
477 U.S. 1, 7 (1985) 10

Statutes

49 U.S.C. section 1513 i, 7, 8, 10-13

49 U.S.C. section 40116b(b) i

Cal. Code Regs. tit. 3, § 3560 (a) 6

California Code of Civil Procedure
section 437c 2

Court Rules

Supreme Court Rule 24.2 ii, 1, 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-488

ALASKA AIRLINES, INC., AMERICAN AIRLINES, INC. DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC. and UNITED AIR LINES, INC.,

Petitioners,

v.

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, HENRY J. VOSS, as Director of the California Department of Food and Agriculture, and STATE OF CALIFORNIA,

Respondents.

OPINION OR JUDGMENT BELOW

Pursuant to Supreme Court Rule 24.2, respondents accept petitioners' statement in their petition for a writ of certiorari.

STATEMENT OF JURISDICTION

Petitioners' basis for invoking the jurisdiction of this Honorable Court is set forth in their petition for a writ of certiorari.

STATUTORY PROVISIONS

Pursuant to Supreme Court Rule 24.2, respondents incorporate petitioners' statement in their petition for a writ of certiorari.

STATEMENT OF THE CASE

Petitioners' statement of the case, set forth in their petition for a writ of certiorari, is substantially correct. Therefore, pursuant to Supreme Court Rule 24.2, respondents accept petitioners' statement of the case except as modified or corrected herein.

First, respondents disagree that the fees collected cannot be considered for the use of airport facilities. The inspections, which the fees fund, are conducted at airports in areas established by the United States Department of Agriculture. Just like gates, concessions, and baggage systems, agricultural inspections are part of airport functions. The record discloses, however, that the nature of the use of airport facilities remain a material difference of fact between the parties to be resolved at subsequent trial. This Court should note, as correctly pointed out by petitioner, that the relief granted petitioners by the trial court was pursuant to a motion for summary judgment filed by petitioners. Under California Code of Civil Procedure section 437c, summary judgment motions are granted without trial, and upon a showing of "no material differences of fact" in contention. On this issue and many other issues, petitioners and respondents disagree as to whether material differences of fact exist.

Secondly, respondents also contend that there is a triable issue as to whether they can be considered operators of the airport facilities.

Thirdly, the inspections, which the State fee funds, are conducted jointly by the respondents and the United States Department of Agriculture. That federal agency has noted the positive impact of the State program.

Fourthly, the State of California has reduced the agricultural pest inspection fee challenged here to $43, per flight. Also, individual airlines may apply for exemptions.

SUMMARY OF ARGUMENT

The Anti-Head Tax Act has a limited reach, as is apparent both from Congress' intent and the language of the statute. It prohibits only state taxes on passengers, on the sale of air transportation, and on gross receipts. The state charge challenged here is on the entry of flights from certain foreign countries, for the purpose of funding agricultural pest inspections. This function does not come within the reach of the Anti-Head Tax Act. This interpretation, by the California Court of Appeals, is consistent with other court decisions, including the opinions of this Honorable Court.

Additionally, numerous issues in this case would prevent the Court from reaching this core issue. These other issues include petitioners' failure to raise issues before the state courts, the existence of triable issues of fact, and the question of the existence of a private right of action.

All these reasons dictate that this Honorable Court deny petitioners' petition for a writ of certiorari.

ARGUMENT

Having been denied review by the California Supreme Court, petitioners now turn to this Honorable Court to decide a simple question of statutory interpretation. This question, however, has been succinctly and appropriately answered by the California Court of Appeals. *See Alaska Airlines, Inc. v. Department of Food & Agric.*, 33 Cal.App.4th 506 (1995) (reprinted at Pet.App. pp. A-2 to A-15). And despite petitioners' pleas to the contrary, the California Court of Appeals answered the pertinent question in a manner consistent with cases decided by this Honorable Court and all other courts addressing the federal Anti-Head Tax Act.

In their petition for a writ of certiorari, petitioners invoke an interpretation of the Anti-Head Tax Act which has been previously raised by the airline industry -- that the Act is plenary in nature, that it prevents almost every general governmental charge for services provided, and that, therefore, any finding by any Court that the Act is narrow in scope, must be challenged by the airline industry. Petitioners also, without reference to the record, assert that the impact of this minor fee disrupts their ability to compete, invites overzealous State taxation spreading across the nation, and could result in possible foreign retaliation. Of course, there is no evidence of either foreign retaliation or other State fees comparable to California. And petitioners also fail to advise the Court that there is contested evidence concerning the actual financial impact of this modest fee upon the overall operations of these major domestic corporations.[1/]

---

1. Petitioner submitted self-serving declarations from airline corporate officers, which merely concluded that the imposition of an $85 inspection fee (for which an inspection service is provided or

Petitioners have been required to pay $85 for each of their airplanes that enters into the State of California from a foreign country, in order to pay for increased agricultural inspections. Petitioners have not challenged the inspections themselves. In fact, the inspections are done jointly with the United States Department of Agriculture. The inspections advance the valuable goal of protecting California agriculture and thereby that of the United States. Such is why, no doubt, USDA entered into an agreement with California to perform the inspections, funded by the State fee. Petitioners have not challenged the reasonableness of the amount of the inspection fee. In fact, that fee has recently been reduced to reflect actual budget realities. (*See* Cal. Code Regs. tit. 3, § 3560 (a)). Individual airlines can apply for exemption if they make the required showing. (*See id.*)

---

offered) would be "passed-on" to passengers. However, no documentary evidence was provided of any such "pass-through" and as will be noted herein, an increase in the general operating expense of the airline is not tantamount to a "head tax" within the narrow meaning of the Act in question.

I.

THE CALIFORNIA COURT OF APPEAL CORRECTLY DECIDED THAT THE FEDERAL ANTI-HEAD TAX ACT DOES NOT PROHIBIT CALIFORNIA FROM IMPOSING THIS AGRICULTURAL INSPECTION FEE

The basic difference between the arguments advanced by petitioners and those advanced by respondents is a difference in interpretation of former 49 U.S.C. section 1513.[2] This federal act is correctly entitled the "Anti-*Head* Tax Act." This Act was promulgated by Congress for a narrow and specific purpose: to eliminate state "head" (per passenger) taxes and state gross receipts taxes on airlines. However, petitioners' view the act in question as an "Anti-*Tax* Act." They ignore the limited purpose of the Act, and they ignore the specific federal statutory language. They also ignore numerous authority interpreting the Act in a manner consistent with the California Court of Appeal's opinion.

As petitioners correctly note, this Act was the direct result of this Court's 1972 decision, *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). This decision, which held that state and local governments were not preempted from imposing *any* tax or fee on air transportation, resulted in a flurry of congressional action and led to the passage of 49 U.S.C. section 1513. It is instructive to review the exact language as passed by Congress. Section 1513 states:

---

2. While this matter was pending on appeal, Congress recodified this section. It now appears at 49 U.S.C. § 40116. Respondents follow petitioners' suggestion, and use the former designation.

> "(a) No state . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . .
>
> "(b) Nothing in this section shall prohibit a state . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sale or use taxes on the sale of goods or services . . . and nothing in this section shall prohibit a state . . . owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities."

On its face, section 1513 preempts a limited and enumerated number of state *charges*, including gross receipts taxes imposed on the sale of air transportation or the carriage of persons traveling in air commerce. Section 1513(b), in turn, expresses Congress' view that the states are free to impose on airlines and air carriers "taxes other than those enumerated in subsection (a) . . . including . . . property taxes, net income taxes, and franchise taxes" among others.[3/]

---

3. In subsection (b), Congress utilized a term "including" in the operative language. It is a well-established rule of statutory interpretation that the words "include" and "including" are not ordinarily words of limitation, but words of enlargement. (*Federal Land Bank v. Bizmarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); *Chemehveri Indian Tribe v. California St. Bd. of Equalization*, 757 F.2d 1047, 1054 (9th Cir. 1985)). Thus the list is hardly exhaustive as the petitioners have argued below.

The clearly stated legislative intent and purpose of this federal act was to prevent local "head" taxes on airline passengers and preempt state taxes on the gross receipts of airlines. *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 12 n.6, 13 (1983). As Senator Cannon, one of the sponsors of the bill, stated in part:

> "Finally, Mr. President, S. 38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The bill prohibits the levying of State or local head taxes, fees, gross receipts taxes or other such charges, *either on passengers, or on the carriage of such passengers in interstate commerce*."

119 Cong. Rec. 3349 (1973) (emphasis added). The California Court of Appeal opinion correctly noted that, "Congress did not intend to prohibit all State taxes or charges on air carriers" but rather, "'the prohibition was intended to apply only to 'head taxes' and the like.'" 33 Cal.App.4th, at 512-13 (quoting *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 16 (1986) (Burger, J. concurring)).

The challenged state fee is imposed on "[e]ach air carrier or foreign air carrier engaged in foreign air commerce which carries animals or plants or other materials which are, or are likely to be, infected or infested with any pest . . . upon the initial landing in this state of each flight of the carrier which originates outside the United States." (Cal. Food & Agric. Code § 5353(c)). To rule that this inspection fee is a "head tax" would be a misinterpretation of the Act. The state inspection fee cannot be considered a charge on (1) persons traveling in air commerce, (2) on the carriage of persons traveling in air commerce, (3) on the sale of air

transportation, or (4) on the gross receipts derived therefrom. The state charge in question is for the use of existing airport facilities, and specifically for inspection services performed on the airlines.[4] It is not imposed on passengers. It is not a tax or charge based upon the amount of money earned by a given airline. This fixed charge is set by statute or regulation, and does not vary depending upon the number of passengers, amount of freight, or gross receipts. All that matters is that an aircraft arriving from specified foreign countries and entries with commodities which might be infested with foreign pests triggers the charge.[5] Such clearly does not meet the purpose of the Anti-Head Tax Act, under any theory. Nor does it fit within the specific statutory prohibition of the federal act.

Section 1513 cannot be interpreted as broadly as the respondents suggest. Congress did not preempt States from regulating airlines and their operations. As this Honorable Court has succinctly stated, the Federal Aviation Act, of which section 1513 is only a part, is not plenary in nature and, therefore, does not exempt the ability of States to regulate air travel. In *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1985), this Court held that, "rather than prohibit state regulation in the area, Congress invited it. This is not the stuff of preemption."

---

4. The Court should note that obviously the inspections take place at airports. Because the fee does not fall within the prohibitions of 49 U.S.C. section 1513, it is not necessary for the respondent to establish that the fee is actually for the "use" of airport facilities per se.

5. The sole attack on the constitutionality of the State Act is vested upon the federal Anti-Head Tax. No constitutional charge of burden of foreign commerce, discrimination or other allegation has been made in the instant record.

There have been numerous cases in which courts have interpreted section 1513(a) not to apply to fees which do not involve taxes on passengers, in situations very similar to the one at bar. (*See Alamo Rent-a-Car, Inc. v. City of Palm Springs*, 955 F.2d 30, 31 n.1 (9th Cir. 1991) (ground transportation costs not subject to § 1513(a)); *Travel Services, Inc. v. Government of the Virgin Islands*, 904 F.2d 186, 188-89 (3rd Cir. 1990), *cert. denied*, 498 U.S. 939 (tax on travel agents not an indirect levy prohibited by § 1513(a)); *City and County of Denver v. Continental Air Lines, Inc.*, 712 F.Supp. 834, 838-39 (D. Colo. 1989) (airport concession revenues not subject to § 1513(a)); *Island Aviation, Inc. v. Guam Airport Auth.*, 562 F.Supp. 951, 957-59 (D. Guam 1982) (assessments against airline for departure lounge costs not violative of § 1513(a)).)

For these reasons, the California Court of Appeal opinion is neither novel nor does it stray from established statutory interpretation principles. It is consistent with other cases interpreting this federal act.

II.

THE CALIFORNIA COURT OF APPEAL'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS.

Attempting to attract this Court's scrutiny, petitioners contend that the California Court of Appeal's decision conflicts with this Court's opinions in *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7 (1983) and *Northwest Airlines, Inc.* v. *County of Kent, Michigan*, 510 U.S. ____, 114 S.Ct. 855 (1994). Even a cursory reading of this Court's opinions reveals that these cases involve distinct issues.

In *Aloha Airlines*, this Court reviewed a Hawaii Supreme Court decision upholding a state statute imposing a tax on the gross income of airlines operating within the State. This was a gross receipts tax, which this Court understandably found expressly preempted by the Anti-Head Tax Act; after all, section 1513(a) prohibits taxes on "gross receipts" from the sale of air transportation."

In *Northwest Airlines*, this Court affirmed a decision of the Sixth Circuit. Before the Court was a challenge to the allocation of costs (as user fees) to commercial aviation, general aviation, and nonaeronautical concessionaires. The legal and factual question was whether the airport's accounting was reasonable, as required by 49 U.S.C. section 1513(b). This Court held that the Act must be interpreted as a whole but that the allocation of fees, unless clearly excessive, was left to the judgment of those assessing the fees.

Indeed, petitioners' interpretation of section 1513 is at odds with this Court's decision in *Northwest*. Petitioners argue that unless a specific tax or fee is listed as an exception in section 1513(b), the tax or fee violates

section 1513(a). This interpretation badly misconstrues both the facial meaning of the Anti-Head Tax statute as well as the legislative intent behind it. Section 1513(b) is an enumerated list of exceptions to section 1513(a). However, if a tax, fee or charge *does not fall within the restrictions of section 1513(a),* then section 1513(b) has no application. Respondents assert, as the California Court of Appeal correctly found, that the fees charged by the California Department of Food and Agriculture for limited inspections of certain flights originating from foreign countries, and carrying commodities which may contain pests not found in the United States, simply do not fall within those charges restricted by section 1513(a). Thus, under the clear language of this Court in *Northwest*, reading the statute as a whole, the California Court of Appeal was correct in its interpretation and petitioners myopic focus on *only* section 1513(b) is misapplied.

Neither *Aloha Airlines* nor *Northwest* addresses the exact questions answered by the California Court of Appeal in this case. This case posits an entirely different question, answered by the language and legislative history of the Anti-Head Tax Act: can a state impose a fee, collected solely to fund agricultural pest inspections, on the *entry* of planes from foreign counties. This question the California Court of Appeal answered correctly and consistent with this Court's opinions.

There is insufficient evidence of "pass through" in any event. Petitioners cite no record reference to their allegations that the State Act charges are passed on to paying passengers. As mentioned in note 1, *supra*, the sole basis below for this contention was a series of conclusionary declarations from airline executives that the State inspection fee had been "passed through" to fare-paying passengers. But no extrinsic evidence was

presented and respondents contested this self-serving "evidence."

In any event, operating expenses, such as herein, even if "passed through" to passengers as increased costs, do not violate the Anti-Heat Tax Act. (*New England Legal Foundation v. Mass. Port Authority*, 883 F.2d 187 (1st Cir., 1989).

III.

THE RECORD IN THIS CASE IS NOT SUFFICIENT TO AFFORD THIS COURT COMPLETE REVIEW OF THE QUESTIONS PRESENTED.

Even if this Honorable Court were to conclude that this case presents important questions meriting this Court's review, the status of the record in this case and its procedural history presents problems for that review.

Because of these difficulties as well as others, it would be far better for the matter to be remanded to the trial court for a completion of any proceedings (including possible amendment of the complaint and the additional of new claims concerning the Act's constitutionality by petitioners should they desire) and resolution of the matter with the complete record. This could then be presented to the Court, if appropriate, for review.

The federal Anti-Head Tax Act, on its face, prohibits four types of fees or taxes: (1) on persons traveling in air commerce, (2) on the carriage of persons traveling in air commerce, (3) on the sale of air transportation, or (4) on the gross receipts derived therefrom. In their petition for a writ of certiorari, petitioners ask this Court to decide whether the fee in question is on the sale of air transportation. Yet, this question was not briefed in the lower court. (*See* Clerk's Transcript pp. 378-80.) Nor did the trial court reach the issue. (*See* Petition Appendix pp. A-42 to A-54.) This was acknowledged and noted by the California Court of Appeal. (33 Cal.App.4th, at 511 n.4.) Petitioners can not now, without prior argument and without a factual record, raise this question before this Honorable Court.

The order reversed by the Court of Appeal was the granting of a motion for summary judgment. And

while the trial court and the Court of Appeals held that there existed no triable issue of fact, respondents have argued, and will argue before this Honorable Court, that such issues exist on this record. These issues include whether the State operates any of the airports in question, whether these charges are for the use of airport facilities, and whether the fees are passed on to the passengers. As to this last point, at least one circuit has found this point significant. (*See New England Legal Found. v. Massachusetts Port Auth.*, *supra*, 883 F.2d 157, 170.)

Lastly, there is the issue, sidestepped by the California Court of Appeals, as to whether petitioners may pursue a private cause of action. At least one court has ruled that there is no private right of action under the Anti-Head Tax Act. (*See Air Transport Ass'n of Am. v. City of Los Angeles*, 844 F.Supp 550, 552-55 (C.D. Cal. 1994).)

CONCLUSION

The Court of Appeal decision is correct, restrained and properly reconciles federal and state law. It raises no constitutional questions and is fully consistent with the body of federal law interpreting the federal Act. It does not warrant this Honorable Court's attention. Respondents respectfully request that this Honorable Court deny petitioners' petition for a writ of certiorari.

Dated: October 18, 1995.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
(Counsel of Record)
CHARLES W. GETZ, IV
Assistant Attorney General
JOHN DAVIDSON
Supervising Deputy Attorney General
MARC N. MELNICK
Deputy Attorney General

RODERICK E. WALSTON
Chief Assistant Attorney General

Counsel for Respondents

(2)

Supreme Court, U.S.
FILED
OCT 30 1995
CLERK

No. 95-488

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

ALASKA AIRLINES, INC., AMERICAN AIRLINES, INC., DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., AND UNITED AIR LINES, INC.,
Petitioners,
VS.
CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, HENRY J. VOSS, as Director of the California Department of Food and Agriculture, and the STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
DONALD B. AYER
JONES, DAY, REAVIS & POGUE
Metropolitan Square
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

BURT PINES
(Counsel of Record)
JOHN A. SCHWIMMER
ALSCHULER, GROSSMAN & PINES
2049 Century Park East
39th Floor
Los Angeles, CA 90067-3213
(310) 277-1226
Counsel for Petitioners

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

BEST AVAILABLE COPY

5 pp

No. 95-488

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

ALASKA AIRLINES, INC., AMERICAN AIRLINES, INC., DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., AND UNITED AIR LINES, INC.,
Petitioners,
VS.
CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, HENRY J. VOSS, as Director of the California Department of Food and Agriculture, and the STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I.

THE PETITION PRESENTS A LEGAL QUESTION OF FEDERAL STATUTORY INTERPRETATION, AND THERE ARE NO OUTSTANDING FACTUAL ISSUES TO BE RESOLVED

In their Brief in Opposition to Petition for a Writ of Certiorari ("Opposition"), respondents California Depart-

ment of Food and Agriculture, Henry J. Voss, and State of California (collectively, "Respondents") argue that this matter is not ripe for review by certiorari because, they contend, there are a number of disputed factual issues that remain to be resolved. Respondents' contention is untrue and unsupported by the record.

Respondents are correct that judgment was first entered by the trial court upon a motion for summary judgment. Rejecting the very same arguments Respondents now present to this court, the trial court determined that there were no disputed issues of material fact and granted summary judgment in favor of Petitioners.

The California Court of Appeal reversed based on their *legal* interpretation of the scope of the federal Anti-Head Tax Act, 49 U.S.C. § 40116(b) (former 49 U.S.C. App. § 1513). In reaching its conclusion, the Court of Appeal made it clear that it was deciding a *legal* issue:

> *"The essential facts relating to these issues are undisputed;* thus, the issue presented is a question of law involving the interpretation of the two relevant statutes [the federal Anti-Head Tax Act and the state Inspection Fee Act], a matter subject to our independent review."

Pet. App. A-8 (emphasis added).

Thus, the only issue presented by this Petition is whether the California Inspection Fee is prohibited by the terms of former 49 U.S.C. App. § 1513(a). No further factual issues need to be considered or addressed to determine that issue.

As both the trial court and Court of Appeal below concluded, if the California Inspection Fee falls within the statutory scheme of former 49 U.S.C. App. § 1513(a), it is undisputable that the Inspection Fee cannot be saved by the exceptions set forth in former 49 U.S.C. App. § 1513(b). See *Northwest Airlines, Inc. v. County of Kent*, 510 U.S.

____, 114 S.Ct. 855, 127 L.Ed.2d, 183 (1994). The Court of Appeal below stated:

> "As the trial court correctly concluded, the undisputed facts established that the proceeds of the inspection fee in question are not used [for the use of airport facilities], but rather, they are used to finance an inspection program. Therefore, as respondents [Petitioners here] maintain, the service charge is not authorized by the user fee exception found in section 1513(b)."

Pet. App. A-13 (footnote omitted).

II.

CONTRARY TO RESPONDENTS' ARGUMENTS, 49 U.S.C. § 1513(a) IS NOT RESTRICTED TO FEES RELATED TO PASSENGERS

The Court of Appeal opinion below and Respondents here both contend that the Inspection Fee imposed on air carriers, based on "the initial landing" in California of flights from foreign countries (California Food and Agricultural Code § 5353(a)), simply does not fall within the statutory scheme of former 49 U.S.C. App. § 1513. This conclusion is based on the contention that the federal statute is intended only to prohibit "head" taxes on passengers. (Opposition, pp. 7-10.) That conclusion, however, directly conflicts with this Court's decisions in *Northwest, supra,* and *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 104 S.Ct. 291, 78 L.Ed.2d 10 (1983).

Indeed, if the Inspection Fee is held to fall outside the statutory scheme, it is difficult to envision what fees are prohibited other than direct charges on passengers. On its face, former 49 U.S.C. App. § 1513(a) does not limit its prohibitions to fees on passengers or related to passengers. As Petitioners argued in the court below, among the prohibited fees are those on the "sale of air transportation," which

under Title 49 is defined as "the transportation of persons *or property* as a common carrier for compensation . . ." 49 U.S.C. §§ 40102(5) and (23) (emphasis added.). Respondents' interpretation of the Act would impermissibly read out the words "or property" from the statutory definition of "air transportation."

Moreover, if the reasoning of Respondents and the Court of Appeal below is accepted, the important public policy embodied in the federal legislation will be emasculated because fees imposed on a per plane basis, rather than a per passenger basis, will be *prima facie* permissible regardless of the governmental entity that imposes the fee (contravening Section 1513(b)'s requirement that airport user fees can only be imposed by entities "owning or operating an airport") or the purpose for which the revenue is used (contravening Section 1513(b)'s requirement that a user fee may only be imposed "for the use of airport facilities").

CONCLUSION

For the foregoing reasons and as set forth in their Petition, Petitioners request that this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

BURT PINES
(Counsel of Record)
JOHN A. SCHWIMMER
ALSCHULER, GROSSMAN & PINES
2049 Century Park East
39th Floor
Los Angeles, CA 90067-3213
(310) 277-1226
Counsel for Petitioners

Of Counsel:
DONALD B. AYER
JONES, DAY, REAVIS & POGUE
Metropolitan Square
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

October 30, 1995